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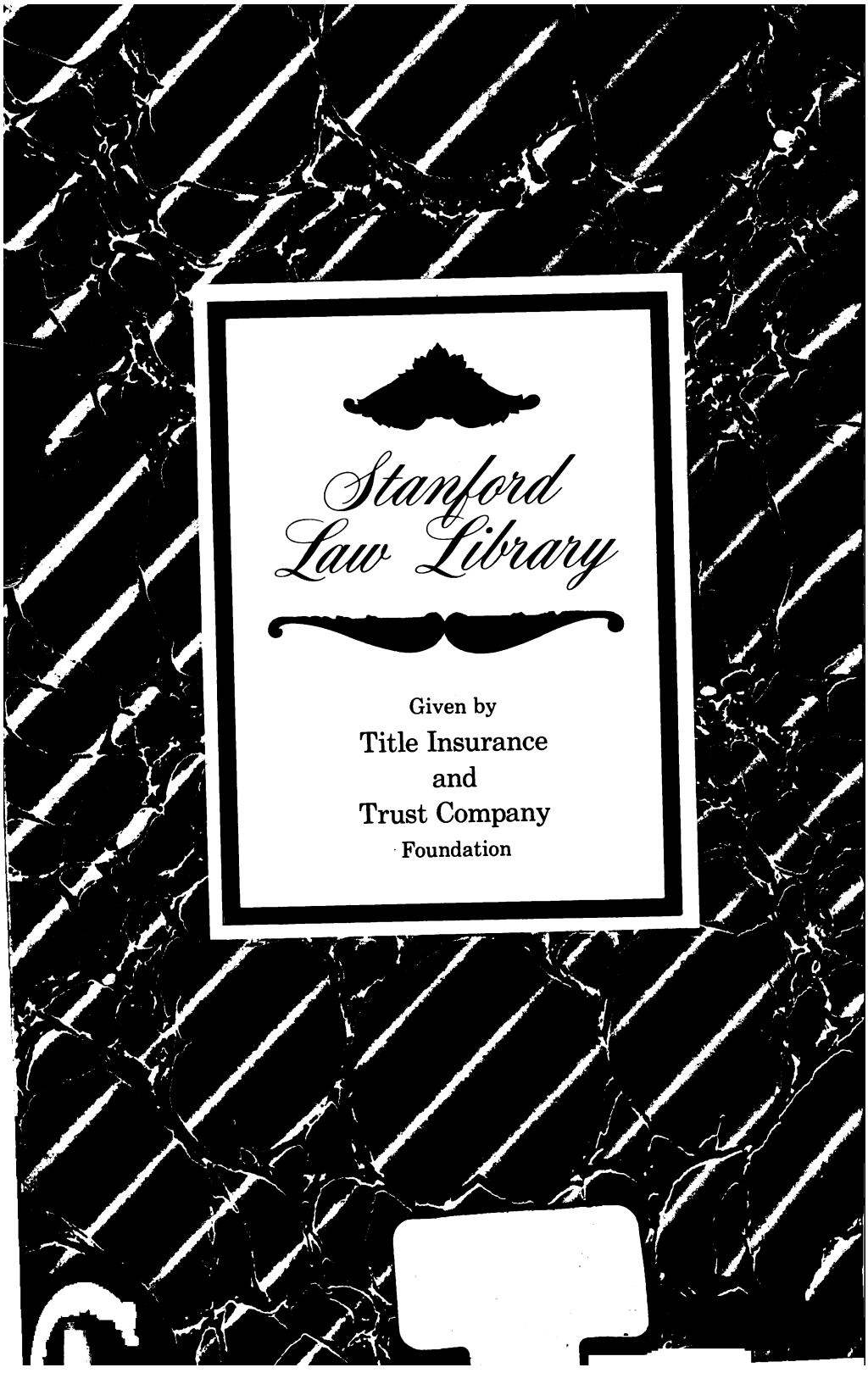
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WIGRAM'S

RULES OF LAW

RESPECTING THE

ADMISSION OF EXTRINSIC EVIDENCE

IN AID OF THE

Interpretation of Wills.

AN EXAMINATION

OF THE

RULES OF LAW

RESPECTING THE

ADMISSION OF EXTRINSIC EVIDENCE

IN AID OF THE

Interpretation of Wills.

BY THE

RIGHT HON. SIR JAMES WIGRAM.

Fourth Edition,

By W. KNOX WIGRAM, M.A.,

OF LINCOLN'S INN, ESQ., BARRISTER-AT-LAW.

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TO

THE RIGHT HONOURABLE

SIR JAMES PARKE,

ONE OF THE BARONS

OF HER MAJESTY'S COURT OF EXCHEQUER,

This Work is,

BY HIS PERMISSION,

RESPECTFULLY INSCRIBED.

[*December*, 1834.]

PREFACE

TO THE

FOURTH EDITION.

I HAVE been entrusted by the distinguished author of the following pages with the duty of preparing a Fourth Edition for the press; the last—that of 1840—having been long since out of print.

The Work itself has been cited with high and peculiar approbation in every branch of the Superior Courts of this kingdom, and has been referred to, as a conclusive authority, by the principal text-writers both in this country and in America. The Seven Propositions which it enunciates may be taken not only to embrace but to exhaust the theory of the Rules examined.

Unfortunately, the most entire assent to a canon of exposition in the abstract, by no means secures its just application to the facts of each particular case; and an undue degree of laxity in this latter respect may, it is conceived, be detected in certain of the reported decisions.

The calamity which so prematurely deprived the

Profession and the public of the services of Sir James Wigram as a Judge, has of course prevented his revising the present Edition. It was his wish that no portion of the original text should be displaced; and therefore, with the fullest latitude kindly allowed me as to the introduction of new matter, either in the text or notes, I have felt it best, in spite of occasional inconvenience, to confine myself exclusively to the latter.

Every addition to the volume of 1840 is enclosed within brackets, and for these passages I am entirely responsible.

The paging of the Third Edition, being that almost universally referred to in the text-books and reported cases, is preserved in the margin.

W. KNOX WIGRAM.

4, *Stone Buildings*,
June, 1858.

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TO THE

FIRST EDITION.

THE writer of the following Observations[a] was accidentally present at the hearing of the cause of *Goblet* v. *Beechey*, in July, 1826, and the Observations were written immediately afterwards, principally with a view to the information of the writer. They have since lain on the shelf, except when, in connection with other questions respecting the interpretation of wills, he has been led to reconsider their contents. In the recent case of *Page* v. *Broom* (December, 1830), before the Lord Chancellor, a point was touched upon which involved the principles to which the Observations relate, and revived the interest which the writer had previously taken in the subject. On recurring, upon that occasion, to what he had written in 1826, it appeared to him that his Observations might, in some respects, be acceptable to the Profession, although he could not but feel that, in point both of matter and arrangement,

[a] The First Edition was printed in the form of Observations upon the Case of *Goblet* v. *Beechey*.

they required a more elaborate revision than his present engagements will allow him to bestow upon them. Between the alternative of replacing them upon the shelf or publishing them in a state unsatisfactory even to himself, he has made choice of the latter,—because, after a very attentive study of the reported cases, he is convinced that the difficulties which appear to perplex the important doctrine of explaining written instruments by the aid of extrinsic evidence, are not inherent in it, but are mainly attributable to the peculiar language in which the law upon the point is usually laid down,—and because he felt, that the elucidation of the subject could not but be assisted by a candid though imperfect discussion of its principles.

Lincoln's Inn,
1*st January*, 1831.

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TO THE

SECOND EDITION.

—◆—

SINCE the former Edition of this little Work was published, several important cases have arisen which involved the question of admitting Extrinsic Evidence in aid of the Exposition of Wills, and the attention of the Courts has been pointedly called to the distinctions which it was the object of the author to establish. Adverting to the practical nature and general importance of the subject, he trusts he is rendering an acceptable service to the Profession in collecting these cases together. He has further endeavoured, in this Edition, to simplify the subject itself, by exhibiting it in its proper character,—namely, as part of a general system of Rules applicable to the Exposition of Wills in general, and not an insulated point depending upon Rules peculiar to itself.

Lincoln's Inn,
1*st December*, 1834.

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TO THE

THIRD EDITION.

This Edition is little more than a reprint of the last, with the addition of the cases since reported. Those cases will be found to have reduced the law to a settled principle.

Lincoln's Inn,
25th March, 1840.

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PROPOSITION II.—Where there is nothing in the context of a will from which it is apparent that a testator has used the words in which he has expressed himself in any other than their strict and primary sense, and where his words so interpreted are *sensible with reference to extrinsic circumstances*, it is an inflexible rule of construction, that the words of the will shall be interpreted in their strict and primary sense, and in no other, although they may be capable of some popular or secondary interpretation, and although the most conclusive evidence of intention to use them in such popular or secondary sense be tendered 18

PROPOSITION III.—Where there is nothing in the context of a will, from which it is apparent that a testator has used the words in which he has expressed himself in any other than their strict and primary sense, but his words, so interpreted, are *insensible with reference to extrinsic circumstances*, a Court of law may look into the extrinsic circumstances of the case, to see whether the meaning of the words be sensible in any popular or secondary sense, of which, *with reference to these circumstances*, they are capable 42

PROPOSITION IV.—Where the characters in which a will is written are difficult to be deciphered, or the language of the will is not understood by the Court, the evidence of persons skilled in deciphering writing, or who understand the language in which the will is written, is admissible to *declare* what the characters are, or to inform the Court of the proper meaning of the words. . . . 61

PROPOSITION V.—For the purpose of determining the object of a testator's bounty, or the subject of disposition, or the quantity of interest intended to be given by his will, a Court may inquire into every *material* fact relating to the person who claims to be interested under the will, and to the property which is claimed as the subject of

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disposition, and to the circumstances of the testator and of his family and affairs, for the purpose of enabling the Court to identify the person or thing intended by the testator, or to determine the quantity of interest he has given by his will.

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PROPOSITION VII.—Notwithstanding the Rule of Law, which makes a will void for uncertainty, where the words, aided by evidence of the material facts of the case, are insufficient to determine the testator's meaning—Courts of Law, in certain special cases, admit extrinsic evidence *of intention* to make certain the *person* or *thing* intended, where the description in the will is insufficient for the purpose.

These cases may be thus defined:—where the object of a testator's bounty, or the subject of disposition (*i. e.* the *person* or *thing* intended), is described in terms which are applicable indifferently to more than one *person* or *thing*, evidence is admissible to prove which of the persons or things so described was intended by the testator 109

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EXAMINATION,

ETC.

["I agree in the necessity of adhering to general rules in the construction of Wills and other instruments. It is expedient that such rules should be held sacred; because they withdraw the decision from the discretion of the individual judge, and prevent him from pursuing his own views of each particular case. And there is less inconvenience in the hardship which may sometimes be occasioned by a strict adherence to the rule, than in the confusion which must follow on departing from it."—*Per Tindal, C. J.*, 7 Bing. 279.]

1. THE Statute of Frauds, which regulates the disposition of property by will, requires (except in certain cases specified in the statute) that the will shall be in writing.[a]

[a] The Statute of Frauds, 29 Car. II. c. 3, enacts—Sect. 5, "That, from and after the said four-and-twentieth day of June, all "devises and bequests of any lands or tenements, devisable either "by force of the Statute of Wills, or by this statute, or by force of "the custom of Kent, or the custom of any borough, or any other "particular custom, shall be in writing, and signed by the party so "devising the same, or by some other person in his presence and "by his express directions, and shall be attested and subscribed in "the presence of the said devisor by three or four credible wit-"nesses, or else they shall be utterly void and of none effect."

Sect. 19. "And for the prevention of fraudulent practices in "setting up nuncupative wills, which have been the occasion of

[2] 2. The object of the present Work is to answer an important practical question, to which this enactment gives rise, namely,—Under what restrictions is the admission of extrinsic evidence, in aid of the exposi-

"much perjury: Be it enacted by the authority aforesaid, that, "from and after the aforesaid four-and-twentieth day of June, no "nuncupative will shall be good, where the estate thereby be- "queathed shall exceed the value of thirty pounds, that is not "proved by the oaths of three witnesses (at the least), that were "present at the making thereof; nor unless it be proved that the "testator, at the time of pronouncing the same, did bid the persons "present, or some of them, bear witness that such was his will or "to that effect; nor unless such nuncupative will were made in the "time of the last sickness of the deceased, and in the house of his "or her habitation or dwelling, or where he or she had been resi- "dent for the space of ten days or more next before the making of "such will, except where such person was surprised or taken sick, "being from his own home, and died before he returned to the "place of his or her dwelling."

[The repealing clause of the 7 Will. IV. & 1 Vict. cap. 26, enacts, *inter alia*, that an Act passed in the thirty-second year of the reign of King Henry the Eighth, intituled 'The Act of Wills, Wards, and Primer Seisins,' whereby a man may devise two parts of his lands, and also so much of an Act passed in the twenty-ninth year of the reign of King Charles the Second, intituled 'An Act for the Prevention of Frauds and Perjuries,' as relates to devises or bequests of lands or tenements, or to the revocation or alteration of any devise in writing of any lands, tenements, or hereditaments, or any clause thereof, or to the devise of any estate *pur autre vie*, or to any such estate being assets, or to nuncupative wills, or to the repeal, altering, or changing of any will in writing concerning any goods or chattels or personal estate, or any clause, devise, or bequest therein, shall be repealed, except so far as the two last-mentioned Acts, or either of them respectively, relate to any wills or estates *pur autre vie* to which the repealing Act does not extend. The latter Act (sec. 9) then provides, generally, that no will shall be valid unless it shall be in writing, and unless its execution be attended by the formalities thereinafter prescribed.]

tion of a will, consistent with the provisions of a statute, which makes a writing indispensable to the purpose for which the instrument was made? [b]

3. The preceding paragraph has been objected to, as not accurately raising the question which the title [3] of this volume professes to examine. It has been urged, 'that the practice of admitting extrinsic evidence to interpret wills, had obtained at common law before the existence of the statute, and that this practice was properly continued after the statute; for that it was not the intention of the framers of the statute to alter or abridge any legitimate or established modes of expounding a written instrument, but merely to substitute a written for a nuncupative will; that the statute made a writing indispensable in certain cases, in which a writing was previously unnecessary, but left untouched the means of expounding the writing which it required; and that Courts of law therefore must, notwithstanding the statute, be at liberty still to avail themselves of the aid of extrinsic evidence, to the full extent to which authority had, before the statute, established its admissibility.' [c] If the reasoning upon which the objection is founded were admitted to be correct, the author is not prepared to

[b] The Statute of Wills, 32 Hen. VIII. c. 1, had, to a certain extent, raised the same question at an earlier period. As the Statute of Frauds embraces property of all descriptions, the former statute may well be passed over without affecting the substantial question which is discussed in the following pages. [See preceding note.]

[c] This point will be again observed upon in a later page, infra, pl. 154.

admit that the objection itself would be so. The ob-
[4] jection points only at the effect or consequences of the statute, and does not displace the proposition in the text, that the statute is the source from which those effects or consequences flow.[1]

4. The restrictions under which extrinsic evidence was by the common law (before the statute) admissible, in aid of the exposition of a written instrument, in cases in which the law did not require a writing, will of course form a limit beyond which extrinsic evidence cannot be admitted to assist in expounding a writing which a statute makes indispensable. But a question may suggest itself, whether the construction of an instrument, which is made necessary by a *statute*, may not be subject to stricter rules than the common law alone would impose.[d]

5. In this view of the case it might, perhaps, appear that the more logical course of inquiry would be, first, to determine the state of the law before the statute, and then to ascertain whether the statute had to any and what extent affected the rules of law which

[1] [Whether the learned author has conclusively refuted the above objection, the reader must decide. It is no doubt true that the statute gave rise to the important practical question stated in the author's second paragraph; but it seems equally clear that this question is not coextensive with that to which the title of the volume professes to apply. The latter question existed previously to, and independently of, the Statute of Frauds, although undoubtedly changed in character, as well as in practical importance, by the various enactments which have since rendered writing essential to the validity of a testamentary instrument.]

[d] Infra, pl. 154.

it found in operation at the time it was passed. An attentive consideration of the subject, however, and of the authorities which apply to it, will show that such a course of investigation is uncalled for, and that [5] it would embarrass rather than assist the inquiry. By the common law [e] (before the statute), parol evidence was inadmissible to contradict, vary, or add to a written instrument. As this rule, however, was founded on a principle of convenience only, it was holden, before the statute, that parol evidence was, in certain cases, admissible to determine the *person* or *thing* intended, *where the description in the instrument was insufficient for that purpose*,—as in a devise to A. B., where there were two persons of the same name; or a devise of the manor of Dale, where the testator had two manors of that name, North Dale and South Dale. In which cases parol evidence of witnesses who spoke to the testator's *intention*, was held admissible to determine which of the two persons, named respectively A. B., and which of the manors of Dale, was intended by the testator.[f] And from the cases cited in a subsequent page,[g] it will be seen that where the identity of the *person* or *thing* intended by a testator has been the only point [6] in dispute, and the description in the will has been insufficient to determine it, Courts of law, since the

[e] 1 Phil. on Evid. 548—561, 7th ed.; [2 ib. 339 et seq. 10th ed.;] *Parteriche* v. *Powlet*, 2 Atk. 383: and see Prop. VI., infra, pl. 105: *Goss* v. *Lord Nugent*, 5 B. & Adol. 58.

[f] Infra, pl. 136.

[g] Infra, pl. 139 et seq.

statute, have in like manner, in certain special cases, admitted the evidence of witnesses who spoke to the testator's *intention*—to make certain the person or thing intended by the testator.

6. Whether the admission of extrinsic evidence to make certain the person or thing intended, where the description of the will is insufficient for the purpose, can, upon principle, be reconciled with the provisions of the statute, in all the cases in which it appears to have been admitted, is a point which, for the present, may be left in suspense. It is sufficient in this place to observe, that, notwithstanding the cases in which parol evidence of the nature just adverted to has been held admissible, the Courts had uniformly professed to be governed by an admitted principle—that the judgment of a Court[h] in expounding a will should be simply *declaratory* of what is *in* the instrument. [7] This was the general rule at common law before the statute; and if the statute has not strengthened its obligations, it certainly has not relaxed them.[i]

7. To return, then, to the question stated at the outset—Under what restrictions is the admission of extrinsic evidence, in aid of the exposition of a will, consistent with the provisions of the Statute of Frauds?

[h] It has not been thought necessary or useful to distinguish the provinces of the Court and Jury. Each, within its own province, is in principle bound by the rules which it is the object of these pages to elucidate. In Courts of equity the Judge performs the office of both.

[i] See Prop. VI., infra.

8. The answer to this question is usually given in the terms of the common maxim which distinguishes ambiguities into two kinds, *latent* and *patent*—admitting extrinsic evidence in the former case, and excluding it in the latter. As the maxim itself, however, requires much explanation, it has been thought most convenient to exclude it altogether as a guide in the present inquiry, and to make it the subject of a separate examination, in confirmation of the principles which, in the following pages, are submitted to the consideration of the reader.

9. The question just suggested has become much perplexed by a want of proper attention, on the part both of the Courts and of text writers, to the different *purposes* to which the admissibility of extrinsic evi- [8]
dence in aid of the exposition of wills may be applied, and to the different *nature* of the evidence which (with reference to such different purposes) parties have tendered for admission. It is said (and correctly), that the statute, by requiring a will to be in writing, precludes a Court of law from ascribing to a testator any intention which his written will does not express, and, in effect, makes the writing the only legitimate evidence of the testator's intention. "No will is within the statute but that which is in writing; which is as much as to say, that all that is effectual and to the purpose must be in writing, without seeking aid of words not written." [k] At the same time, however,

[k] *Brett* v. *Rigden*, Plow. 345; and see 2 Vern. 625; Hobart, 32; and see *Hiscocks* v. *Hiscocks*, infra, pl. 183.

Courts of law, though precluded from ascribing to a testator any intention not expressed in his will, admit their obligation to give effect to every intention which the will properly expounded contains. The answer, therefore, to the question above proposed—enjoined as well as sanctioned by the general principle above mentioned—must be, that any evidence is admissible which, in its nature and effect, simply explains
[9] what the testator *has* written; but no evidence can be admissible which, in its nature or effect, is applicable to the purpose of showing merely what he *intended* to have written. In other words, the question in expounding a will is not,—What the testator meant? as distinguished from—What his words express? but simply —What is the meaning of his words?[1] And extrinsic evidence, in aid of the exposition of his will, must be admissible or inadmissible with reference to its bearing upon the issue which this question raises.

10. The distinction involved in the last observation between evidence which is ancillary only to a right

[1] In *Doe* d. *Gwillim* v. *Gwillim*, 5 B. & Adol. 129, Parke, J., said, "In expounding a will, the Court is to ascertain, not what the testator actually *intended*, as contradistinguished from what *his words express*, but what is the meaning of the *words he has used*." And in *Rickman* v. *Carstairs*, 5 B. & Adol. 663, Lord Denman, C. J., said, "The question in this and other cases of construction of written instruments, is, not what was the intention of the parties, but what is the meaning of the words they have used?" See also per Littledale, J., in *Doe* d. *Templeman* v. *Martin*, 4 B. & Adol. 783, and per Parke, J., in S. C. 1 Nev. & Mann. 524.

["The expression, that the rule of construction is to be the *intention* of the testator, is apt to lead into error, because that word

understanding of the *words* to which it is applied, and which is therefore simply *explanatory of the words* themselves,—and evidence which is applied to prove *intention itself* as an independent fact, is broad and [10] palpable;—and as this distinction is essential to a right understanding of the subject, and will frequently be referred to in the following pages, it may be convenient to adopt the expression *explanatory evidence* to describe such extrinsic evidence as is strictly of the former kind; and to adopt the expression, *evidence to prove intention*, to describe the latter species of evidence. The expressions do not, perhaps, satisfactorily explain themselves;—but, with the aid of the preceding observations, the distinction intended to be taken will be understood.

11. It should be further observed, that it is not, as an insulated question, that the admissibility of extrinsic evidence in aid of the exposition of wills, can properly be considered. The subject is part only—and that a subordinate one—of a general system of rules, which Courts of law have established for the correct

[is capable of being understood in two senses, namely, as descriptive of that which the testator intended to do, and of that which is the meaning of the words which he has used. The will must be in writing; and the only question is, what is the meaning of the words used in that writing? To ascertain which, every part of it must be considered, with the help of those surrounding circumstances, which are admissible in evidence to explain the words, and put the Court as nearly as possible in the situation of the writer of the instrument, according to the principle laid down in the excellent work of Sir James Wigram on that subject."—Per Lord Wensleydale, in *Grey* v. *Pearson*, 6 Ho. Lo. Cas. 106.]

interpretation of wills; and the true nature and bearings of this particular question can be properly understood only when viewed in connection with the entire system of which it forms a part.

[11] 12. The SEVEN PROPOSITIONS following, applicable to the exposition of wills, and embodying (in its proper place) the particular subject of the present investigation, are submitted to the consideration of the reader, as the results both of principle and authority.

13. I. A testator is always presumed to use the words in which he expresses himself according to their strict and primary acceptation, unless from the context of the will it appears that he has used them in a different sense; in which case the sense in which he thus appears to have used them will be the sense in which they are to be construed.[m]

14. II. Where there is nothing in the context of a will, from which it is apparent, that a testator has used the words in which he has expressed himself in any other than their strict and primary sense, and where his words so interpreted are *sensible with reference to extrinsic circumstances*, it is an inflexible

[m] Upon this and every other point connected with the interpretation of wills, the reader will find the fullest information in Mr. Jarman's valuable edition of Powell on Devises. [To the second edition of this work, edited by Messrs. Wolstenholme and Vincent, the editor takes this opportunity of acknowledging his own repeated obligations.]

rule of construction, that the words of the will shall be interpreted in their strict and primary sense, and [12] in no other, although they may be capable of some popular or secondary interpretation, and although the most conclusive evidence of intention to use them in such popular or secondary sense be tendered.

15. III. Where there is nothing in the context of a will, from which it is apparent that a testator has used the words in which he has expressed himself in any other than their strict and primary sense, but his words, so interpreted, are *insensible with reference to extrinsic circumstances*, a Court of law may look into the extrinsic circumstances of the case, to see whether the meaning of the words be sensible in any popular or secondary sense, of which, with reference to these circumstances, they are capable.

16. IV. Where the characters in which a will is written are difficult to be deciphered, or the language of the will is not understood by the Court, the evidence of persons skilled in deciphering writing, or who understand the language in which the will is written, is admissible to declare what the characters are, or to inform the Court of the proper meaning of the words.

17. V. For the purpose of determining the object of a testator's bounty, or the subject of disposition, or [13] the quantity of interest intended to be given by his

will, a Court may inquire into every material fact relating to the person who claims to be interested under the will, and to the property which is claimed as the subject of disposition, and to the circumstances of the testator and of his family and affairs; for the purpose of enabling the Court to identify the person or thing intended by the testator, or to determine the quantity of interest he has given by his will.

The same (it is conceived) is true of every other disputed point, respecting which it can be shown that a knowledge of extrinsic facts can, in any way, be made ancillary to the right interpretation of a testator's words.

18. VI. Where the words of a will aided by evidence of the material facts of the case, are insufficient to determine the testator's meaning, no evidence will be admissible to prove what the testator intended, and the will (except in certain special cases—*see* Proposition VII.) will be void for uncertainty.

19. VII. Notwithstanding the rule of law, which
[14] makes a will void for uncertainty, where the words, aided by evidence of the material facts of the case, are insufficient to determine the testator's meaning—Courts of law, in certain special cases, admit extrinsic evidence of *intention* to make certain the *person* or *thing* intended, where the description in the will is insufficient for the purpose.

These cases may be thus defined: where the ob-

ject of a testator's bounty, or the subject of disposition (*i. e.* the *person* or *thing* intended), is described in terms which are applicable indifferently to more than one person or thing, evidence is admissible to prove which of the persons or things so described was intended by the testator.

20. A separate examination of each of these Propositions will now be gone into.

[15] PROPOSITION I.

A testator is always presumed to use the words in which he expresses himself, according to their strict and primary acceptation, unless, from the context of the will, it appears that he has used them in a different sense, in which case the sense in which he thus appears to have used them, will be the sense in which they are to be construed.[2]

21. The first branch of this proposition will be

[2] [In *Hicks* v. *Sallitt*, 3 De G. M. & Gor. 782; 18 Jur. 915, Lord Cranworth, C., said:—"When a testator uses a word which has a well-known ordinary acceptation, it must appear very certain that he has said on the face of the will that he uses it in another sense, before the ordinary sense can be interfered with. . . . In order to alter the meaning of a word, it must appear, not that the testator *might* have meant it in a different sense, but that he *must* have meant it in a different sense; and this can only be shown by pointing out some inconsistency in different parts of the will, or a positive statement of such being the sense intended, or a *reductio ad absurdum* by not taking the word in a qualified sense." See also per Sir James Wigram, V. C., in *Ford* v. *Ford*, 6 Hare 490; per Lord Eldon in *Church* v. *Mundy*, 15 Ves. 406; per Lord Brougham in *Doe* d. *Winter* v. *Perratt*, 6 Mann. & Gr. 357; per Erskine, J., in *Shore* v. *Wilson*, 9 Cl. & Fin. 512; per Lord Wensleydale, in *Grey* v. *Pearson*, 6 Ho. Lo. Cas. 106; and per Sir J. L. Knight Bruce, in *Key* v. *Key*, 4 De G. M. & Gor. 84; and in *Lowe* v. *Thomas*, 5 De G. M. & Gor. 316.]

familiar to the learned reader, and can scarcely require either explanation or authority to support it.[n]

22. The second branch of the proposition may be as briefly disposed of. For where it appears upon the face of a will, that the testator has used particular words in this or that particular sense, no adequate reason could possibly be assigned for rejecting the sense (however inaccurate) in which the testator himself *thus declares* he has used them.[3] In such

[n] 1 Douglas, 341: 2 Ball & B. 204: Id. 506: 5 B. & Cres. 77, 82: *Crowder* v. *Stone*, 3 Russ. 223: [*Shore* v. *Wilson*, 9 Cl. & Fin. 355; *Mostyn* v. *Mostyn*, 5 Ho. Lo. Cas. 155; *Douglas* v. *Fellowes*, Kay 114; *Saberton* v. *Skeels*, 1 Russ. & Myl. 589. See as to the *strict and primary meaning* of the word 'portrait,' *The Duke of Leeds* v. *Lord Amherst*, 13 Sim. 459; S. C. on appeal, 9 Jur. 359; 'jewels,' *Brook* v. *Warwick*, 2 De G. & Sm. 435; *Cavendish* v. *Cavendish*, 1 Bro. C. C. 467; 'relations,' *Green* v. *Howard*, 1 Bro. C. C. 31; 'cousins,' *Stoddart* v. *Nelson*, 6 De G. M. & Gor. 68; see S. C. 4 W. R. 109; 'family,' *Re Terry's Will*, 19 Beav. 580; *Gregory* v. *Smith*, 9 Hare, 708; 'domestic,' *Ogle* v. *Morgan*, 1 De G. M. & Gor. 359; 'devise,' *Morgan* v. *Morgan*, 4 De G. & Sm. 173; 'money,' *Larner* v. *Larner*, 3 Drew, 704; *Manning* v. *Purcell*, 7 De G. M. & Gor. 55; 'effects,' *Doe* d. *Haw* v. *Earles*, 15 M. & W. 450; etc., etc.]

[3] [The right of every testator thus to act as his own interpreter might be illustrated by examples almost without end. Thus, in deference to the context, the word 'money' has been held to pass stock in the funds, *Dowson* v. *Gaskoin*, 2 Kee. 14; a husband has been held to be one of the objects of a power expressed to be in favour of his wife 'and her family,' *M'Leroth* v. *Bacon*, 5 Ves. 159; 'descendants' have been permitted to take as 'representatives,' *Styth* v. *Monro*, 6 Sim. 49; and 'next of kin' as 'legal representatives,' *Walter* v. *Makin*, 6 Sim. 148, *Walker* v. *Marquis of Camden*, 16 Sim. 329; words of limitation have been treated as words of purchase, *Bagshaw* v. *Spencer*, 2 Atk. 580; and the use of the words 'joint tenants' held consistent with the creation of a tenancy in common, *Booth* v. *Alington*, (V.C.S.) 5 W. R. 811; 'all' has been read 'any,' *Doe* d. *Gallini* v. *Gallini*, 5 Barn. and Ad.

[16] cases, therefore, a departure from the strict and primary sense of the words, in favour of the testator's

[621, and 'fifth schedule' substituted for 'fourth schedule,' *Hart* v. *Tulk*, 2 De G. M. & Gor. 300; the word 'issue' has been restricted so as to mean 'children' only, *Pope* v. *Pope*, 14 Beav. 591, *Slater* v. *Dangerfield*, 15 M. & W. 263; and the word 'children' enlarged so as to be construed 'issue' generally, *Farrant* v. *Nichols*, 9 Beav. 329; 'nephews and nieces' have been held to include great-nephews and great-nieces, *James* v. *Smith*, 14 Sim. 214; the copulative particle has been read as the disjunctive, and *vice versâ*, *Green* v. *Harvey*, 1 Hare 431, *Day* v. *Day*, Kay 703, *Morris* v. *Morris*, 17 Beav. 198, *Maude* v. *Maude*, 22 Beav. 290; 'freehold estate' has been held synonymous with 'real estate,' *Reeves* v. *Baker*, 18 Beav. 372; expressions large enough to have included real estate have been restricted to personalty, *Coard* v. *Holderness*, 20 Beav. 147; and the words 'legacy' and 'bequest' respectively, extended to signify a devise of real estate, 1 Ea. 37 n. (*b*), *Whicker* v. *Hume*, 14 Beav. 518; etc.

The above Proposition obviously distributes itself under the two following rules:—

1. No word or phrase can be divested of its strict and primary meaning, by reference to the context, until the Court is satisfied, by such context, that the testator did not employ such word or phrase in its strict and primary sense.

2. No word or phrase can be clothed with a secondary or incorrect meaning, by reference to the context, until the Court is satisfied, by such context, as to the exact sense in which the testator did employ such word or phrase.

See *Mellish* v. *Mellish*, 4 Ves. 45; *Walker* v. *Tipping*, 9 Hare 800; *Auther* v. *Auther*, 13 Sim. 422; *Taylor* v. *Richardson*, 2 Drew. 16; 1 *Jarm. Wills*, 2nd Ed. 420.

By force of the controlling context, a word or phrase *may*, in one part of a will, bear a meaning different from that assigned to it in another: *Dalzell* v. *Welch*, 2 Sim. 319; *Carter* v. *Bentall*, 2 Beav. 551; *Head* v. *Randall*, 2 Y. & Coll. C.C. 231; *Williams* v. *Teale*, 6 Hare 239; *Hedges* v. *Harpur*, 9 Beav. 479; *Neathway* v. *Reed*, 3 De G. M. & Gor. 18. See however per Lord Brougham in *Doe* d. *Winter* v. *Perratt*, 6 Mann. & Gr. 362, and per Lord Cottenham, in S. C. ib. 385; *Leeming* v. *Sherratt*, 2 Hare 14. As to the effect of a clear mistake upon the face of a will, see *Langston* v. *Langston*, 2 Cl. & Fin. 240, infra, pl. 57 n. [d].]

intention, is properly, and indeed necessarily, permitted.[o]

23. In the case of *Dent* v. *Pepys*,[p] the Vice-Chancellor substituted the name of one set of devisees for another, upon the ground that the context of the will required him to do so.

[o] See *Royle* v. *Hamilton*, 4 Ves. 437; 2 Eden, 196, n. (*a*), and the cases there cited; 3 Bro. C. C. 68; 1 Doug. 341; 5 Ves. 401; 8 Ves. 10; 10 Ves. 195: *Winterton* v. *Crawfurd*, 1 R. & Myl. 407. According to the same principle carried to its extent, it seems that where there are several successive instruments all referring to the same subject, the Court will look at them all. *Courtney* v. *Ferrers*, 1 Sim. 137. So, also, where several contemporaneous instruments form one transaction. *Colegrave* v. *Manby*, 2 Russ. 238.

[p] 6 Madd. 350.

[17] PROPOSITION II.

Where there is nothing in the context of a will from which it is apparent that a testator has used the words in which he has expressed himself in any other than their strict and primary sense, and where his words so interpreted are sensible with reference to extrinsic circumstances,[1] *it is an inflexible rule of construction, that the words of the will shall be interpreted in their strict and primary sense, and in no other, although they may be capable of some popular or secondary interpretation, and although the most conclusive evidence of intention to use them in such popular or secondary sense be tendered.*[2]

24. The importance of this rule, and the strictness with which it is applied in practice, will justify the following statement of some of the principal cases by which it is illustrated.

25. Thus, though the word *child* may be construed to mean illegitimate child, where the proper meaning [18] of the word is, of absolute necessity, excluded;[a] yet, if no such absolute necessity exist, the word shall

[1] [See per Coleridge, J., 9 Cl. & Fin. 525.]

[2] [See the judgment of Sir J. L. Knight Bruce, in *Bird* v. *Luckie*, 8 Hare, 301.]

[a] See infra, pl. 51 et seq.

receive no other than its strict and proper interpretation.[b]

26. So, although in the case of a devise of "my real estate," property subject to a power may pass, where there is no real estate to satisfy the devise;[c] yet if there be *any* real estate upon which the will can operate, it is otherwise.[d] [3]

[b] *Cartwright* v. *Vawdry*, 5 Ves. 530; *Godfrey* v. *Davis*, 6 Ves. 43; *Fraser* v. *Pigott*, MS.; S. C., 1 Younge, 354: *Wilkinson* v. *Adam*, 1 Ves. & B. 422; *Swaine* v. *Kennerley*, 1 Ves. and B. 469; *Harris* v. *Lloyd*, 1 Turn. & Russ. 310; *Mortimer* v. *West*, 3 Russ. 370. *N.B.* the recent case of *Bagley* v. *Mollard*, 1 Russ. & Myl. 581. [*Doe* d. *Thomas* v. *Beynon*, 12 Ad & Ell. 431; *Owen* v. *Bryant*, 2 De G. M. & Gor. 703; *Warner* v. *Warner*, 20 L. J. Ch. 273, S. C. 15 Jur. 141; *Overhill's Trusts*, 1 Sm. & Gif. 362; *Gabb* v. *Prendergast*, 1 Kay & Joh. 439; *Pratt* v. *Mathew*, 22 Beav. 328. A child *en ventre sa mère* is, for all purposes of construction, considered as a living child: *Clarke* v. *Clarke*, 2 H. Bl. 399; *Clarke* v. *Blake*, 2 Ves. jun. 673; *Storrs* v. *Benbow*, 3 De G. M. & Gor. 390.].

[c] Infra, pl. 53.

[d] *Lewis* v. *Llewellyn*, 1 Turn. & Russ. 104; *Denn.* v *Roake*, 5 B. & Cres. 720; Sug. on Powers, c. 5, ss. 5, 6. [*Hoste* v. *Blackman*, 6 Madd. 190; *Doe* d. *Caldecott* v. *Johnson*, 7 M. & Gr. 1047.]

[3] [The 7 Wm. 4 & 1 Vict. c. 26, enacts (sec. 24):—"That "every will shall be construed, with reference to the real estate and "personal estate comprised in it, to speak and take effect as if it "had been executed immediately before the death of the testator, "unless a contrary intention shall appear by the will" (see *Bullock* v. *Bennett*, 1 Kay & Joh. 315, S. C. on appeal, 7 De G. M. & G. 283; *Goodlad* v. *Burnett*, ib. 341; *Cole* v. *Scott*, 1 Mac. & Gor. 518); and, sec. 27,—"That a general devise of the real estate of the "testator, or of the real estate of the testator in any place, or in "the occupation of any person mentioned in his will, or otherwise "described in a general manner, shall be construed to include any "real estate, or any real estate to which such description shall ex- "tend, which he may have power to appoint in any manner he may "think proper, and shall operate as an execution of such power,

27. So, personal estate subject to a power, will not pass under the words "my personal estate," whether the testator has personal estate at the time of

["unless a contrary intention shall appear by the will; and in like "manner a bequest of the personal estate of the testator, or any "bequest of personal property described in a general manner" (see *Hawthorn* v. *Shedden*, 3 Sm. & Gif. 293), "shall be construed to "include any personal estate, or any personal estate to which such "description shall extend, which he may have power to appoint in "any manner he may think proper, and shall operate as an execution "of such power, unless a contrary intention shall appear by the "will." (See *Stillman* v. *Weedon*, 16 Sim. 26.)

Under the latter of these sections a general (as distinguished from a limited) power over personalty may now be executed by a bequest of personal property described in a general manner (*Spooner's Trusts*, 2 Sim. N. S. 129), and a general devise of realty under similar circumstances will have a like statutory effect (*Lake* v. *Currie*, 2 De G. M. & Gor. 536). But a mere general bequest of the testator's personal estate will still, as heretofore, be ineffectual as regards the execution of a limited power (*Cloves* v. *Awdry*, 12 Beav. 604). As regards the effect of a general devise of realty to the objects of a limited power, it may be questioned whether the author's reasoning in paragraph 27 must not now apply equally to the case of real estate. Suppose by will executed before 1838, A. having, as to certain real estate, a power of appointment among the children of B., and being entitled to no other realty, made a general devise in their favour; it is clear that the power would have been well executed for the reason stated by the author in paragraph 26. But suppose the devise subject to the new law, it is equally clear that, by virtue of sec. 24, it *might* have had an operation without executing the power. Thus what would have been a good execution of the power under the old law would, in the case put, be no longer so under the new. If this conclusion be correct, the language of Lord St. Leonards in *Lake* v. *Currie*, which was the case of a *general* power, must be understood in a less extensive sense than that which at first sight it might appear to bear. "It is clearly settled," observed his Lordship, "that a general devise or bequest will not, independently of the late statute, operate as an execution of a power; but it is also settled, that where a testator disposes of real estate, not having any other than

making his will or not;[4] for, as personal estate acquired after the date of the will would pass by the

[what is subject to the power, he is, in such case, to be taken as dealing with that estate, and that, as to both realty and personalty, if the Court is satisfied by the manner in which the particular property is referred to that the testator intended to deal with that property, the disposition will be a valid execution of the power. The cases have gone upon very fine distinctions, but the general rule is clear. It is said, however, that the late statute, which makes a general disposition operate as an execution of a power, and makes also the will take effect as from the death of the testator, has altered the law in this respect. It is argued, that, as before the statute a general bequest of personalty could not operate as an execution of a power, because it would not be any expression of intention on the part of a testator, who, although at the date of his will he might have no other property than that affected by the power, would yet know that the bequest would operate on whatever he might have at his death; so now, since real estate held by the testator at his death will pass by his will, the same rule must apply generally, and a disposition of realty will not operate as an execution of a power, even where the testator has no other at the date of his will, because he may at his death have property which will be affected by the devise. The statute, however, so far from operating in this way, gives greater extent to the intention of testators, and provides as to general powers of appointment that they shall be deemed well executed by a devise, unless a contrary intention appear by the will. The intention was to extend, and not to narrow, the operation of devises, and therefore to hold that cases which before the statute would have been an execution are not so now, would be contrary to the whole scope of the Act; and if the new law is to operate at all, it must be in favour of the appointment. It is now absolutely necessary to show a contrary intention, to exclude the execution of a power, while under the old law it was needful to show the intention to exercise the power; the case is therefore stronger in favour of the appointees under the new than under the old law." See also *Walker* v. *Banks*, 1 Jur. N. S. 606.]

[4] [But now see 7 Will. IV. & 1 Vict. c. 26, s. 27, supra, p. 19, note [3].]

will, it might possibly have had a sensible construction without departing from the strict meaning of the words.[e]

[19] 28. So, although the words, *son, child, grandchild,* etc., may be construed in a secondary sense, where the will would be insensible, if the primary meaning of the words were adhered to,[f] yet it is only where that is the case that a departure from the strict sense of the words is permitted.[g]

29. In *Beaumont* v. *Fell*,[h] Gertrude Yardley was held entitled to a legacy, which by the will was given to Catherine Earnley. The Court, however, in that case held it to be material, that no person named Catherine Earnley appeared to claim the legacy.

30. In *Delmare* v. *Robello*,[i] the testator gave a le-

[e] *Andrews* v. *Emmot*, 2 Bro. C. C. 297; *Nannock* v. *Horton*, 7 Ves. 391; *Jones* v. *Tucker*, 2 Mer. 533; *Andrews* v. *Lemon*, cited 4 Dow, 90; *Jones* v. *Curry*, 1 Swanst. 66; *Webb* v. *Honnor*, 1 Jac. & W. 352. [*Dover* v. *Alexander*, 2 Hare, 285; *Davies* v. *Thorns*, 3 De G. & Sm. 347; *Lovell* v. *Knight*, 3 Sim. 275; S. C. 5 Sim. 116; *Lempriere* v. *Valpy*, 5 Sim. 108; *Dumner* v. *Pitcher*, 2 Myl. & K. 277; *Evans* v. *Evans*, 23 Beav. 1; *Shelford* v. *Ackland*, ib. 10.]

[f] Infra, pl. 51, 52.

[g] *Royle* v. *Hamilton*, 4 Ves. 437; 2 Eden, 196, n. [a]; *Reeves* v. *Brymer*, 4 Ves. 698; *Radcliffe* v. *Buckley*, 10 Ves. 195; *Shelley* v. *Bryer*, 1 Jac. 207; *Hart* v. *Durand*, 3 Anst. 684. [*Durrant* v. *Friend*, 16 Jur. 709; *Stoddart* v. *Nelson*, 2 Jur. N. S. 27; *Corporation of Bridgenorth* v. *Collins*, 15 Sim. 541; *Smith* v. *Lidiard*, 3 Kay & Joh. 252; *Crook* v. *Whitley*, 7 De G. M. & G. 490.]

[h] 2 P. Wms. 140. And see the observations upon this case in *Hiscocks* v. *Hiscocks*, infra, pl. 183, [and in 1 *Jarm. Wills*, 2 Ed. 368. See also *Lee* v. *Pain*, 4 Hare, 251; *Ryall* v. *Hannam*, 10 Beav. 536; *Re Rickit's Trusts*, 11 Hare, 299.]

[i] 1 Ves. jun. 412. [S. C. 3 Bro. C. C. 446. See also *Holmes* v.

gacy to the children of his two sisters, Reyne and Estrella. Reyne never was married; and before the date of the will she had become a nun professed, and had changed her name to Maria Hieronyma. The testator had a third sister, Rebecca, who had several children. The bill was filed by the children of Re- [20]
becca, claiming the legacy, upon the ground that Rebecca and not Reyne was intended; and evidence was offered to prove the fact, but the evidence was rejected and the bill dismissed.[5] See also the case from Swinburn, cited in *Beaumont* v. *Fell, ubi sup.*

31. In *Hampshire* v. *Peirce*[k] a testatrix gave £100 to *the four* children of A., and at a great distance in her will from that legacy she *further* gave £300 to the children of A.—A., at the date of the will, had six children, two by a first husband, and four by a second. It was proved that the testatrix intended, by the first part of her will, the four children of the second marriage; the *same evidence* proved that she

[*Custance*, 12 Ves. 279; *Blundell* v. *Gladstone*, 11 Sim. 467, 1 Ho. Lo. Cas. 778; *Daubeny* v. *Coghlan*, 12 Sim. 507.]

[5] [Lord Thurlow, in rejecting the parol evidence, suggested that Maria Hieronyma might have changed her mind, and escaped into this country and had children, notwithstanding her vow. He decided, therefore, that the claim of the children of Rebecca was untenable, inasmuch as there was a sister answering to the name in the will; for he considered that the assumption of the conventional name did not prevent the applicability of the former name: it was part of the profession merely, and not meant for the world at large. See 1 *Jarm. Wills*, 2 Ed. 365, and *Mostyn* v. *Mostyn*, 3 De G. M. & Gor. 140; S. C. on appeal, 5 Ho. Lo. Cas. 155.]

[k] 2 Ves. sen. 216. See the observations upon this case in *Hiscocks* v. *Hiscocks*, infra, pl. 183.

intended the same four children only by the second part. But though the Court gave effect to the evidence, so far as the first legacy was concerned, it refused to restrain the words in the second bequest.

32. In *Strode* v. *Russel*,[1] a testator devised his lands, tenements, and hereditaments *out of settlement* to A. The testator had some lands which were not [21] comprised in any settlement; and was seized of a reversion in fee in other lands, which were subject to the trusts of a settlement. The Court was of opinion that a reversion in settled lands was a hereditament out of settlement, and (ultimately) refused to admit evidence to show that the lands not comprised in the settlement, and no others, were intended to pass.[6]

[1] 2 Vern. 621; 8 Vin. Abr. 194, pl. 23; 2 Atk. 374.

[6] [In *Hall* v. *Fisher*, 1 Coll. C. C. 47, the testator devised "all that *freehold* farm, called the Wick Farm, in Headington, containing 200 acres or thereabouts, occupied by William Eeley, as tenant thereof," to uses applicable to freehold property only. At the date of the will and of the death of the testator, Eeley held under a lease from the testator 202 acres of land in Headington, which were described in the lease as the Wick Farm. Of this property, 12 acres were leasehold.

Sir J. L. Knight Bruce said:—"The word 'freehold,' as used in this will, seems to me a necessary part of the description which cannot be rejected. If it had been omitted, the probability is, that the leasehold in question would have been held to pass. Again, if the whole of the farm had been leasehold, the insertion of the word 'freehold' would probably not have been material. But there is a subject here which properly answers the description given in the will. There is a freehold farm called the Wick, which contains 200 acres or thereabouts (incorrectness, if there be any incorrectness in that respect, is immaterial), and which is occupied by Eeley. Being of opinion that the freehold part of the farm is properly described by those words in the will, although the leasehold should be ab-

33. In *Pocock* v. *The Bishop of Lincoln*,[m] a testator gave to his son R. the *perpetual advowson* of H. B., in Leicestershire. R., at the time of making the will, was incumbent of the living of H. B. R. claimed the absolute interest in the advowson; and in support of his claim it was argued, that he would take nothing by the will if it were construed to give him a life interest only. Held,[7] that he took only a life interest: for, if R. should resign the living to obtain ecclesiastical preferment, he would have, under the will, the right of presentation to the living; and so the will had *some* operation, without departing from the proper meaning of the words "perpetual advowson," which, strictly interpreted, are descriptive of the subject-matter of the devise, and not of the interest which the testator had in it.

34. In *Doe* d. *Oxenden* v. *Chichester*,[n] the principle now under consideration was carried to its full extent. In that case, the testator devised his "estate of Ashton" to Oxenden. The testator had an estate which he used to call by the name of his "Ashton [22]

[stracted from it, I am obliged to say that not any leasehold land, although used and treated as freehold, can pass under this devise. I regret to be obliged to come to this decision, inasmuch as I think it likely that the testator intended otherwise, but did not sufficiently, or did not accurately, inform his solicitor of the circumstances of the property." See also *Wilson* v. *Eden*, 11 Beav. 237; *Morell* v. *Fisher*, 4 Exch. 591.]

[m] 3 Brod. & Bing. 27; [and see judgment in *Dover* v. *Alexander*, 2 Hare, 283; *Barnacle* v. *Nightingale*, 14 Sim. 456; *Yates* v. *Maddan*, 3 Mac. & Gor. 532.]

[7] [Park, J., *dissentiente*: see his judgment.]

[n] 3 Taunt. 147.

estate," and the accounts relating to which were kept in his steward's book under that name. Part only of this estate was *locally situated* at Ashton. The most conclusive evidence of intention to devise the whole estate, which the testator used to call his "Ashton estate," and not that part only which was locally situated at Ashton, was tendered. The Court, however, was of opinion that the words "estate of Ashton," strictly interpreted, were descriptive of an estate locally situated at Ashton; and, as there was an estate locally situated there, the evidence was rejected. This judgment was affirmed on appeal to the House of Lords.[o]

[o] 4 Dow, 65. See also *Hodgson* v. *Merest*, 9 Price, 556; *Whitbread* v. *May*, 2 Bos. & P. 593. But see *Doe* d. *Gore* v. *Langton*, 2 B. & Adol. 680. [In *Stone* v. *Greening*, 13 Sim. 390, the testator devised and bequeathed all his real and personal estate and effects to trustees, upon trust as to his *freehold* messuage, farm, lands, and hereditaments, situate in the county of Bucks, to apply the same for the benefit of the plaintiffs, according to the directions in his will contained. At the date of his will and of his death he was seised and possessed of a messuage, farm, and lands at M., in the county of Bucks, consisting altogether of 116 acres. Of this property, the messuage and about 94 acres were freehold, the rest being leasehold, held for the remainder of very long terms of years, the commencement of which (except as to one term of 1000 years, which dated from the reign of Queen Elizabeth) was unknown.

The freehold and leasehold portions of the property were so interspersed and intermingled, that it was impossible to distinguish the one from the other; and it appeared that the testator had always treated, described, and dealt with the whole 116 acres as being altogether freehold.

Sir Lancelot Shadwell, V.C., however, held, that as the testator had property in the county of Bucks, to which the words "my free-

35. In *Doe* d. *Westlake* v. *Westlake*,[p] a testator devised an estate to "Matthew Westlake, my brother, and unto Simon Westlake, my brother's son." The [23] testator had three brothers, each of whom had a son

[hold messuage, farm, lands, and hereditaments" were correctly applicable, the leasehold part of the farm was not comprised in those words, but passed by the residuary bequest in the will.

The above decision was unquestionably a correct, however rigorous, application of the rule of law now under consideration. In the recent case of *Anstee* v. *Nelms*, 1 Hurl. & Nor. 225, the Court of Exchequer decided unanimously against a plaintiff, under circumstances which, it is submitted, might in strictness have entitled him to their judgment. A testator in 1804 gave, devised, and bequeathed all and singular his messuages, lands, tenements, and hereditaments *in the parish of Doynton*, in the county of G. The testator died possessed of a farm principally situated in the above parish, one portion of which, however, although surrounded by lands in Doynton, and generally reputed to form part of that parish, was in fact parcel of the parish of Wick. The Court held that the piece of land in question passed. Pollock, C. B., said:— "The question really is, whether this piece of land was parcel or not parcel of the thing devised. If it was reputed to be in Doynton, then the testator meant to give it. He did not mean that if, on investigation, this piece of land, which he supposed to be in Doynton, should turn out to be in Wick, it should not pass. He never intended that the question should depend on the parochiality of the subject-matter of the devise. If, in common with others, he thought that the land was in Doynton, it passed by that description in his will. . . . I have already intimated my opinion, that such a general reputation is sufficient to make it pass, with the rest of the property, by the general description of land in Doynton. I think so, notwithstanding that there is other property in Doynton which strictly answers the description, and that the jury have found that this particular property was in fact in Wick. By the gift of land 'in a parish,' a testator means to pass that which he understands —that which is generally understood—to be in the parish. A sub-

[p] 4 Barn. & Ald. 57.

of the name of Simon. The Court was of opinion, that, in point of legal construction, when the testator spoke of his brother's son, he must be taken to mean the son of that brother who was then particularly in

[sequent discovery of the true parochiality will make no difference; if it were otherwise, a will would mean one thing in 1804 and another in 1855."

Bramwell, B., said:—"The fact turns out to be that, when the testator made his will, this property was commonly reputed to be in Doynton. What, then, is the primary signification of the words 'in the parish of' Doynton, 'which shall be proved to be in Doynton,' or 'commonly reputed to be in Doynton'? I hold the latter to be the natural meaning of the words. The land may have been reputed to be in Doynton for five hundred years; but afterwards, on an inquiry being instituted or on reference to Domesday book, or some other ancient or forgotten record, it may turn out to be in another parish. Suppose a man were to devise an estate which he always supposed to be conterminous with a particular parish. If he devised it by the name and description by which he knew it, I think the case would be similar to those where a man has devised to another by a wrong name. The defendant appears to me to be entitled to this piece of land, if the will is construed according to the terms of Sir J. Wigram's first proposition, namely, that a testator is always presumed to use the words in which he expresses himself, according to their strict and primary acceptation."

It is extremely difficult to reconcile the above decisions. In either case there was a subject to which the words of the devise *were* correctly applicable: in either case there was room for conjecture that the testator intended to pass something, to which the words of the devise were *not* correctly applicable: in either case this conjecture depended upon the alleged ignorance of the testator with regard to the property incorrectly described. And, however much the argument founded upon popular reputation may have weighed with the Court in *Anstee* v. *Nelms*, it must be recollected that, *ex concesso*, such reputation had no more operated to affect the actual parochiality of the spot of land in Wick, than had the belief and conduct of the testator in *Stone* v. *Greening*, converted his leasehold lands into freehold. The last observation attributed

his mind; and decided, that evidence of declarations by the testator was, *for that reason*, inadmissible to prove that he meant Simon, the son of his brother Richard.[8]

36. In *Mounsey* v. *Blamire*, at the Rolls, 25th

[to the learned Chief Baron in *Anstee* v. *Nelms* is, it is submitted, inconclusive. The discovery of a fact previously unknown, *e. gr.* the illegitimacy of a child,—a misfortune of which the testator and those about him may have lived and died in ignorance,—may surely at any time cause a will to express what, but for such discovery, it would not have expressed.

The holding of Bramwell, B., can scarcely, it is conceived, be reconciled with any imaginable test by which the strict and primary meaning of a testator's words can be ascertained.

See also *Brown* v. *Brown*, 11 East, 441; *Parker* v. *Marchant*, 6 Scott, N. R. 485; S. C. 5 Mann. & Gr. 498; *Moser* v. *Platt*, 14 Sim. 95; *Quennell* v. *Turner*, 13 Beav. 240; *Attwater* v. *Attwater*, 18 Beav. 330; *Ricketts* v. *Turquand*, 1 Ho. Lo. Cas. 473; *Doe* d. *Browne* v. *Greening*, 3 M. & Sel. 171; *Wilkinson* v. *Bewicke*, 3 De G. M. & Gor. 937; *Webb* v. *Byng*, 1 Kay & Joh. 580; *Hall* v. *Fisher*, supra, p. 24, note.]

[8] [*Jefferies* v. *Michell*, 20 Beav. 15. In *Andrews* v. *Dobson*, 1 Cox, 425, a legacy was given to "James, son of Thomas Andrews, of Eastcheap, printer." There was no person of the name of Thomas Andrews discoverable in Eastcheap; but there was one James Andrews, a printer, who lived there, and who had one son named Thomas by his first wife, who was related to the testator; he had also a son by a second wife, named James, who was in no manner related to the testator. The plaintiff, the son by the first wife, claimed the legacy, insisting that the testator meant "Thomas the son of James," instead of "James the son of Thomas," and praying some inquiry into the matter.

But Sir Lloyd Kenyon said, that though there were cases in which legacies were left to persons by nicknames, and evidence had been admitted to show that the testator usually called them thereby, yet this was beyond all precedent, and dismissed the bill.

In this case, the identity of the father was clear; but to have admitted the claim of a son who did not exactly answer the descrip-

March, 1828, MS.[q] the testatrix gave the sum of £4000 "to her heir." Evidence was tendered to prove that the person intended by the testatrix was an individual (a stranger) whom she had promised to make her heir, and whom she used to call her heir. The heir-at-law of the testatrix claimed the legacy. The Master of the Rolls decreed the legacy to the heir-at-law.[9]

[tion in the will, as against a son who did, would have been in contravention of the rule of law contained in the above Proposition.]

[q] S. C. 4 Russ. 384.

[9] [The testatrix in this case left three persons her co-heiresses-at-law. It was argued, accordingly, that, since she plainly intended to give the £4000 as a legacy to some single individual, extrinsic evidence ought to be admissible to explain the latent ambiguity which would arise from construing the word 'heir' in its strict legal sense. But Sir J. Leach refused to admit such evidence, observing that the word 'heir' was *nomen collectivum*, and would legally include all those who filled that character. It was declared that the three co-heiresses took as joint tenants. See per Lord Truro, C., in *De Beauvoir* v. *De Beauvoir*, 3 Ho. Lo. Cas. 554.

In *Re Davenport's Trust*, 1 Sm. & Gif. 126, the testator directed his trustees to set apart £1000 stock, and pay the dividends to his nephew G. C. D. for life; and after his decease, in case the said G. C. D.'s "wife" should survive him, to pay the dividends to her for life, to her separate use; and after the decease of the survivor of them, to divide the stock among such of the children of the said G. C. D. as should be then living, in equal shares. The testator died in 1844, and his nephew G. C. D. died in the following year, a bachelor, but leaving five children by M., with whom he had cohabited since 1836. At the hearing (December 22, 1852), evidence was produced on behalf of M., for the purpose of showing that she had always been reputed and received by the members of the testator's family as the wife of G. C. D.; that as such reputed wife she had visited several members of such family; that G. C. D. was in the habit of corresponding with the testator; and that at the date of the will the testator must have known that M. was the

37. In *Boys* v. *Williams*,[r] the testator gave legacies of Bank Long Annuities stock. The assets of the testator being deficient, a question arose whether the

[wife, or reputed wife of his said nephew, and that, in fact, the latter was frequently alluded to by his uncle as having a wife and children.

In support of the claim of M., it was argued that there could be no doubt upon the evidence that the testator believed M. to have been the wife of his nephew, but that the bequest was to her, not in the character of wife, but by way of description. The Court would not support a gift to a person who had assumed a false character with a view to fraud; but it was otherwise where, as in the present case, owing to circumstances not moving from the legatee, the description was inapplicable (*Kennell* v. *Abbott*, 4 Ves. 802 infra, pl. 67, note [6]). The mere fact of the legatee being known to the testator in a character which was not really her own, formed no ground for invalidating the gift (*Rishton* v. *Cobb*, 5 My. & Cr. 145; S. C. 9 Sim 615).

It was admitted at the bar that the gift to the children could not be supported.

Sir J. Stuart, V.C., in deciding against the claim of M., observed that there was nothing in evidence to indicate that she was *personally* known to the testator, or known to him in such a way as to lead to the inference that she was intended when he referred to his said nephew's wife, or to justify the inference that she, and no other person, was in the mind of the testator when he framed the gift in question. "Suppose, for example," continued the learned Judge, "the nephew had survived the testator and married, and afterwards died, there would, in that case, be in existence a person exactly answering in every respect the legatee described in the will, namely, the nephew's wife. Could there be a doubt, that, under these circumstances, the wife would be entitled to the legacy? Yet, according to the construction I am invited to put upon this will, I should be bound to declare that the wife of G. C. D. did not answer the description contained in the will, but that this poor lady, who, it is conceded, was not the wife of the testator's nephew, is, nevertheless, accurately described as his wife." See also *Pratt* v. *Mathew*, 22 Beav. 328.]

3 Sim. 573.

state of those assets was admissible in evidence, as in the case of *Fonnereau* v. *Poyntz*,[8] for the pur-
[24] pose of enabling the Court to construe the words in a particular sense, in which it was alleged the testatrix had used them. The Vice-Chancellor (Sir Lancelot Shadwell) said: "The question before me is, whether there is so much difficulty in construing the expressions which this testator has used, so as to authorize the admission of evidence as to the state of her assets. Before I can hear this evidence, I must be satisfied the ambiguity exists. . . . I do not mean to overrule the case of *Fonnereau* v. *Poyntz*, but that case was decided upon all the words taken together, and upon the particular words used in the will. *In this case I have no doubt about the meaning of the words, and, therefore, I think that I am not at liberty to look at the state of the testatrix's assets.*"[10]

[8] 1 Bro. C. C. 472.

[10] [But see S. C. on appeal before Lord Brougham, C. 2 Russ. & Myl. 689. His Lordship said (p. 693), that upon the question as to the admissibility of the evidence, he entertained no doubt whatever that there had been a miscarriage in that part of the Vice-Chancellor's judgment. To the proposition, that, because the words of the will were clear upon the face of them, extrinsic evidence was inadmissible, it was wholly impossible to accede; that being the case of a latent ambiguity, the very case which, according to all text writers, formed the exception to the general rule against admitting parol evidence to explain or construe the words of the instrument. It was because the ambiguity was not patent, but latent, that is to say, discoverable only upon reference to the subject-matter upon which the will purported to operate, that the Court was justified in resorting to extrinsic evidence at all. It was perfectly true that the Court was not at liberty in the case of any written instrument, whether a will of real or personal estate, or a deed, to

38. In *Fraser* v. *Pigott*, before Lord Lyndhurst, 4th July, 1831,[t] the testator gave a sum of money to A. for life, with remainder to her children, and, if she died without children living at her death, then to

[introduce into the consideration of the question of construction any matter furnished by extrinsic evidence for the purpose of giving a different meaning to the words from that which their plain import conveyed. The Court was not at liberty, by matter of fact, to overrule the construction which was matter of law, arising on the face of the instrument itself. But that proposition was perfectly consistent with the admission of evidence to explain, though not to control, the language,—to aid, though not to vary or alter, the construction.

In *Sayer* v. *Sayer*, 7 Hare, 377, the rule of law now under consideration was judicially commented upon by Sir James Wigram.

"The issue raised by these exceptions is whether the will refers to specific things, and the testatrix in that manner manifests her intention to execute her powers, or whether the legacies are merely general.

"The question is in substance one of 'parcel or no parcel.' The first bequests are clearly general in terms. Do the subsequent words, by that which the Court considers necessary implication, show that the previous words describe the property subject to the power? In considering this question, I have referred to the state of the property subject to the powers of the testatrix, and also to the state of her own property at the date of her will.

"A question was made at the bar, whether I was at liberty to advert to the state of the above property in construing this will. This question might be answered by reference to the decree, which directs the Master to ascertain the state of such property at the date of the will. It is, however, better to meet the objection directly. The objection proceeds upon a mistake as to the purpose for which the reference in the decree was made. When, in construing a will, the question is whether a particular thing is described or not, the Court must admit evidence as to the thing said to be described, or it

[t] MS. And see same case, 1 Younge, 354.

such of his (the testator's) *grandchildren*, being *children* of his *late* sons, William and John, *whether born in wedlock or not*, as A. should appoint. The testator further gave £300 to William Fraser, the son of his *late* son William Frazer, and £250 to Isabella and
[25] Anne, the daughters of his *late* son William. The testator further gave to his *grand-daughter*, Louisa Van H., the wife of Chrisp Van H., £200 to her separate use. The testator then gave the residue of his estate to his sons, William and John, equally, share and share alike, but directed that if either should die in his lifetime, the moiety of such deceased son should go and belong to his *children* equally; and if both die in his lifetime, in such case he gave the residue "to and amongst *all their children* equally, as tenants

[cannot be in a condition to determine whether the words of the will describe it or not. If evidence manifestly impertinent to that question be tendered, the Court is bound at once to reject it; and this is all that is decided by *Nannock* v. *Horton*, 7 Ves. 390–400, and cases of that class to which I was referred,—the amount of the personal estate at the date of the will being immaterial where the will speaks not from its date, but from the death of the testator. Where the evidence tendered may be material, the practice in equity is usually to admit it (as in this case) in the first instance, and reserve the question of its materiality until the hearing of the cause. In deciding upon its materiality, the Court is bound to construe the words of the will in their strict and primary sense, unless the circumstances of the case exclude that sense; and the Court is not at liberty to construe the words in any secondary sense, only because the state of the property or other extrinsic circumstances may make it in the highest degree probable that the words were used in such secondary sense. The strongest cases on this point are *Nannock* v. *Horton*; *Pocock* v. *Bishop of Lincoln* (supra, pl. 33); and *Doe* d. *Oxenden* v. *Chichester* (supra, pl. 34)."]

in common." [Both sons died in the testator's lifetime.] William left three illegitimate children, viz. the said William, Isabella, and Anne, and no legitimate children. John left three legitimate children and two illegitimate children, of whom Louisa Van H. was one. Lord Lyndhurst held, that the illegitimate children of William were entitled to a share of the residue, but that the illegitimate children of John were not so entitled.[14]

[14] [It should not be overlooked that, according to the report of this case in Younge, the plaintiffs, the legitimate children of John, did not oppose the right of the illegitimate children of William to share with them in the residue, and that, consequently, Lord Lyndhurst must not be taken to have judicially decided this branch of the question. The admission of these last-mentioned children (their father being alive at the date of the will, although described as 'late' by the testator) was of course in direct contravention of the rule of law enunciated in the proposition now before the reader. And even had William been dead at the date of the will, it may be doubted whether the decision ascribed to Lord Lyndhurst upon the residuary bequest could be supported upon principle, and whether the mere fact of no legitimate child of William being found among a class who were to take *per capita* could affect the legal presumption that legitimate children only were intended.

In *Overhill's Trust*, 1 Sm. & Gif. 362, the testatrix bequeathed consols to trustees, upon trust to pay the dividends to G. for life, and after his death to divide the capital between all the children of the said G., and of M., the wife of B.

Testatrix died in 1837; G. in 1841; and M. in 1852. The latter left six illegitimate children by B. and no legitimate issue.

It appeared in evidence that these six illegitimate children were well known to the testatrix, who always expressed a strong interest in them and an intention to provide for them by her will; and it further appeared that, *at the date of the will*, M. was of the age of forty-nine years.

"What I am bound to follow," said Sir J. Stuart, V.C., "is that well-established doctrine, that where there is a gift to children as a

39. In *Doe* d. *Ashford* v. *Bower*,[u] the testator devised all his messuages, situated *at*, *in*, or *near* a street called Snig Hill, in Sheffield, which he lately pur-
[26] chased of the Duke of Norfolk's trustees. The testator had *four* houses in a street called West Bar, about twenty yards from Snig Hill, and *two* houses about 370 yards from Snig Hill, and from 390 to 399 yards from the other houses in West Bar. There were no tenements between Snig Hill and the four houses at West Bar; but the intermediate space between all

[class, then, unless there are words so clear as necessarily to apply to and include illegitimate children, or clearly to exclude any but such children, I must hold the description would include legitimate children only. Now the only circumstances in favour of this claim by the illegitimate children are these: that M. was at the date of the will aged forty-nine, and that the testatrix, when she made her will, knew that M. had children, and believed her to be the wife of B., and so describes her. All that supports the view taken by Sir Thomas Plumer in *Beachcroft* v. *Beachcroft*, 1 Madd. 430, and of Lord Lyndhurst in *Fraser* v. *Pigott*, in favour of illegitimate children. But it is quite opposed to the decision of Lord Eldon, in *Harris* v. *Lloyd*, 1 Tur. & Russ. 310, and all other decisions on this subject, except the cases just mentioned. Here it is impossible not to see that this lady might have had legitimate children, and that her legitimate children could not, upon the construction of this will, have been excluded from participating in this gift. However improbable it was that there should be legitimate children of M., they would, if there had been any, have clearly become entitled. According to the argument for the only children of M., they, though illegitimate, would have been entitled to take equally with any such legitimate children; but this would be contrary to the rule of law." See also *James* v. *Smith*, 14 Sim. 216; *Meredith* v. *Farr*, 2 Y. & Coll. C. C. 525; *Owen* v. *Bryant*, 2 De G. M. & Gor. 697; *Worts* v. *Cubitt*, 19 Beav. 421; *Tugwell* v. *Scott*, 24 Beav. 141; 2 Jarm. Wills, 2nd ed. 193.]

[u] 3 B. & Adol. 453; and see *Doe* d. *Smith* v. *Galloway*, 5 B. & Adol. 43.

the testator's houses was covered with tenements, intersected with cross streets. The testator purchased all the houses of the trustees of the Duke of Norfolk under one contract, and the whole were conveyed to him by one conveyance; the ground upon which the four houses stood was there described as situate in New Hall-street, Sheffield, and lying intermixed with ground belonging to another party; that on which the two houses stood was stated to be situate in and fronting to a certain other street in Sheffield, called Gibraltar-street. He redeemed the land-tax upon all the houses by one contract, and had no other houses in Sheffield. The question in the cause was, whether the *two* houses in Gibraltar-street passed under the above-mentioned devise; and the Court held that they did not. Lord Tenterden, C. J., said:—"I am of opinion that the plaintiff is entitled to judgment: the testator devises to the wife of the defendant, *All my messuages situate at, in, or near Snig Hill, which I lately purchased of the Duke of Norfolk, or his trustees.* There are four houses *answering every part of that description,* and to which the defendant is clearly entitled by the will; but he also claims two houses which are at some distance, bought, indeed, of the Duke of Norfolk's trustees, like the four, but not *at or near Snig Hill.*" Littledale, J., said:—"The first part of the description, '*my messuages situate at, in, or near Snig Hill,*' applies to the four houses, and not to those now claimed. The further words, '*which I purchased of the Duke of Norfolk, or his trustees,*' are merely addi- [27]

tional description, and do not extend the effect of what precedes. Houses at or near Snig Hill would have passed by the former part of the clause, although some of them had not been bought of the Duke or his trustees, according to the rule, that, where there is sufficient certainty in description, a false reference added shall not destroy its effect."[v] Parke, J., said:—"One rule of construction is that an heir-at-law shall not be disinherited except by express words; and another, as stated by Lord Bacon, is, that if there be some land, wherein *all the demonstrations in grant* [28] *are true*, and some wherein part are true and part false, the words of such grant shall be intended words of true limitation to pass only those lands wherein all the circumstances are true. Here, all the circumstances are true of the four houses, but not so of the two; these last are not '*at, in, or near Snig Hill*,' and they are in a place bearing a different name."[15]

[v] Bacon's Maxims of the Law; Comments on Reg. 13, and Reg. 24.

[15] [In *Wilson* v. *Squire*, 1 Y. & Coll. C. C. 654, a testator gave £1000 Consols to "The Governors and Trustees of the London Orphan Society in the City Road."

Two Charities claimed the fund, viz. the 'Orphan Working School' in the City Road, and the 'London Orphan Asylum' at Clapton, near London. Extrinsic evidence of intention was tendered on either side.

Sir J. L. Knight Bruce, V.C., said:—"In this case the first subject of inquiry is, whether there is a body of men, or an institution, capable of answering the description given by the testator. He has given a legacy to the Governors of the London Orphan Society, in the City Road. It is clear, therefore, that it is a legitimate subject of inquiry by extrinsic evidence, whether there be a London Orphan

40. In *Richardson* v. *Watson*,[w] a question arose whether two closes of land passed under the word *close*. Parke, J., said,—"Generally speaking, evidence might be given to show that the testator used the word *close* in the sense which it bore in the country where the property was situate, as denoting a *farm*; but here such evidence was not admissible, because it is manifest that in this will the testator used the word *close* in its ordinary sense, as denoting an *enclosure*, for the word *closes* occurs in other parts of the will."

[Society in the City Road. It appears that there is in the City Road a charitable institution, conducted by a voluntary association of persons, for the purpose of educating and bringing up orphans, and apprenticing them, or fitting them for situations of labour.

It is a charitable institution for the benefit of orphans,—certainly in a particular way, but in a reasonable and not extraordinary way. No man can say, that a society so constituted is not an orphan society.

It then remains to deal with the word 'London.' The word may be used in two senses: the one, strict and topographical; the other, popular and general, as meaning the metropolis and the suburbs immediately adjacent.

The testator cannot have meant to use the word London in the former sense; because he, at the same time, mentions the City Road, which is admitted to be not in the city of London. The word is used by him as equivalent to metropolis. He here therefore gives to an orphan society in or near the metropolis, that is to say, in the City Road; and I find in the City Road a charitable society and institution for the benefit of orphans, in the manner already mentioned. He therefore accurately and truly describes the Orphan Working School.

It has, however, been made a question, whether there is not an ambiguity in the will raised by extrinsic evidence? If it were so, it might follow that evidence might be introduced to show what

[w] 4 B. & Adol. 799 [1 Nev. & Mann. 575].

41. The recent case of *Doe* d. *Templeman* v. *Martin*[x] may also be referred to as a case in point.

42. So Lord Bacon, in his comment upon his 13th Maxim, "*Non accipi debent verba in demonstrationem falsam quæ competunt in limitationem veram,*"—states [29] the rule as follows:—"If I have some land wherein all those demonstrations are true, and some wherein part of them are true and part false, then shall they be intended words of true limitation to pass only those lands wherein all those circumstances are true."

43. The case of *Thomas* v. *Thomas*,[y] cited in a subsequent page,[z] should also be referred to here. It is conceived that evidence would not, in that case, have been admissible to prove that any person other than Mary Thomas or Elinor Evans was intended. The will was ambiguous in this respect only, that it

[institution was intended. It is contended that there is another body of persons to which the words of the will are applicable, and the evidence which is said to support this argument is evidence showing that there is another Society, called the London Orphan Asylum, at Clapton,—Clapton being in or near Hackney; the City Road, on the contrary, where the other Society is, being in St. Luke's, Old Street. Is it possible to say, that the description which the testator uses is equally applicable to both? I apprehend that Clapton Society is not described in the will; and that, in order to satisfy the will, the only question is, whether there is an Orphan Society in the City Road. I find that there is such a Society, and that there is no other Charity which can properly be described by the same terms. The parol evidence, therefore, has no place." See also *Bradshaw* v. *Thompson*, 2 Y. & Coll. C. C. 295, *In the matter of the Clergy Society*, 2 Kay & Joh. 615.]

[x] 4 B. & Adol. 771.

[y] 6 Term R. 671.

[z] Infra, pl. 140.

did not determine *which of those two* persons was intended; the will, however inaccurate, was free from ambiguity, *to the extent of showing that one of those two persons was intended.*[a]

44. The case of a devise "to one of the sons of A.," who hath several sons,[b] is within the reason of the proposition now under consideration. The words, although they express an indeterminate intention, are sensible as they stand,—there is no reason in such a case for *concluding* that the testator did not mean that which his words express, and the Court therefore cannot control the words, or give them a meaning they do [30] not bear, and the devise will be void.[c]

45. The rule of construction contained in this proposition is applicable to those cases in which the testator's expressions, though not precise and technical, are so far accurate as to admit of no doubt as to the sense in which they were used.[d] In other words, when a Court is once satisfied that particular words express a particular meaning, although inaccurately, it is just as much bound to adhere to that meaning, as if the most precise and technical expressions had been used.

[a] See cases referred to infra, pl. 45, n. [d]

[b] 2 Vern. 625.

[c] Infra, Proposition VI. [But a gift to all the grandchildren of the testatrix, "with the exception of one, viz. ——" has been established as a gift to the class, not affected by the incomplete exception. *Illingworth* v. *Cooke*, 9 Hare, 37.]

[d] *Fonnereau* v. *Poyntz*, 1 Bro. C. C. 471; *Stafford* v. *Horton*, 1 Bro. C. C. 482; *Attorney-General* v. *Grote*, 3 Mer. 316; *Westlake* v. *Westlake*, 4 B. & A. 57; *Boys* v. *Williams*, 3 Sim. 573, and supra, pl. 37. See *Thomas* v. *Thomas*, supra, pl. 43.

In the *Attorney-General* v. *Grote*,[e] in which the language of the will was most inaccurate throughout, Sir William Grant said, "To authorize a departure from the words of a will, it is not enough to doubt whether they were used in the sense which they properly bear. The Court ought to be quite satisfied that they were used in a different sense, and ought to be able distinctly to say what the sense is in which they were meant to be
[31] used." In the same case Lord Eldon said, "Individual belief ought not to govern the case, it must be judicial persuasion."[16]

[e] Appendix, No. II. [3 Mer. 316; S. C. on appeal, 2 Russ. & Myl. 699.]

[16] [In *Horwood* v. *Griffith*, before Sir J. L. Knight Bruce and Sir G. Turner, LL. JJ., 4 De G. M. & Gor. 700, a testatrix was possessed of four debentures of the Spanish Government, each of which bore impressed upon it the words "Capital £1000 sterling," and professed to secure to the holder £50 per annum in perpetuity, but to be redeemable on payment in London, during the four years succeeding the date thereof, at the rate of £55 per cent., or at any subsequent period at the rate of £60 per cent. *on the nominal amount.* By her will she expressed herself as follows:—"I bequeath unto J. L. and T. B. the sum of £2000 Spanish bonds or coupons now belonging to me, and all dividends or interest which shall be due to me therein at the time of my decease, upon trust," etc. She afterwards disposed of the residue of her property. It was insisted, on behalf of the *cestui que trust*, that the bequest of the Spanish bonds was a complete and effectual disposition of the four above-mentioned debentures, and evidence was tendered to show that the testatrix always spoke of her debentures as for £500 each, being approximately their redeemable value, and of the four as being securities for £2000.

Their Lordships, affirming the decision of Sir J. Stuart, V. C., held that two only of the debentures passed, and that extrinsic evidence as to the declarations of the testatrix with regard to her intention was inadmissible. "It cannot," observed Sir G. Turner,

46. However, in the recent case of *Collison* v. *Girling*,[f] the Lord Chancellor (affirming the decree of the Vice-Chancellor) decided a point which, although he proposed to save whole the principles established in the former cases, appears to have much relaxed the strictness of its application. In that case a testator by his will, dated in 1832, gave to three trustees, upon certain trusts, a sum of £15,000 interest or share in the 3 per cent. Consols, to be deemed a legacy of quantity, and to be due at his decease, as if the same were a specific legacy; and he directed that if he should not die possessed of 3 per cent. Consols sufficient to satisfy the said sum of £15,000 Consols before bequeathed, then his executors should, within two months after his decease, purchase so much Annuities in that fund as should raise the money required for

[L. J., "be denied, that these debentures answer the description of Spanish debentures, and if, therefore, two of them do not answer the description of "the sum of £2000 Spanish debentures," it must be in consequence of the sum of £2000 forming part of that description. But, if these debentures were to be described with reference to any sum of money (and this testatrix has thought proper so to describe them), it cannot, I think, be said that a description of them as £1000 debentures was not correct. It is true that they do not secure capital sums of £1000, but neither on the other hand do they secure any capital sums. They could not, therefore, take their designation from any capital sums secured by them; but there is impressed upon the face of them the word "Capital £1000," and this, I think, was quite sufficient to warrant their being described as £1000 debentures. I am of opinion, therefore, that two of these debentures correctly answer the description contained in this bequest; and there being nothing else answering to that description, I think that no further evidence can be received."]

[f] 4 Myl. & Cr. 63. [S. C. on appeal, 9 Cl. & Fin. 88. See *Essington* v. *Vashon*, 3 Mer. 434.]

that purpose out of his real estate. He created a term in his real estates, one trust of which was to raise the full amount, or, as the case might require, the deficiency of the said sum of £15,000 3 per cent. Consolidated Bank Annuities, in case he should not
[32] have at the time of his decease sufficient 3 per cent. Annuities in that fund to answer that legacy. At the time of the testator's death in 1835, he had £3000 Consols standing in his name, which had been purchased in 1834; but he had, in 1824, sold out £12,000 Consols, which then stood in his name, and paid the produce to his brother, who had mortgaged to him a freehold estate, subject to a proviso for redemption, upon retransfer into his (the testator's) name, when requested so to do, of £12,000 Consols, and payment of interest equal to the dividends in the meantime, and had entered into a covenant for the retransfer in the terms of the proviso. No request to retransfer the stock had been made when the testator died. The Lord Chancellor held that the £12,000 Consols secured by the mortgage passed by the will as part of the legacy of £15,000 3 per cent. Consols. His Lordship's judgment was as follows:—"The question upon this appeal is, whether a sum of £12,000 3 per cent. Consols, which the testator, at the time of making his will, was entitled to have transferred to him under an ordinary stock mortgage, is applicable to the payment of a legacy of £15,000 like stock under his will. The Vice-Chancellor's decree has declared that it is. Henry Collison, the residuary legatee,

contends that it is not, but that it belongs to him as [33]
part of the residue. It appears from the mortgage deed, stated in the Master's report, that, in the year 1824, the testator was possessed of £12,000 3 per cent. Consols, which, upon the application of Nicholas Cobb Collison, was sold, and the proceeds paid to him, upon his undertaking, *at the request of the testator*, to transfer to him the like sum of £12,000 3 per cent. Consols, and in the meantime to pay to him such sums as should be equal to the dividends upon such stock. The deed then recites, that the retransfer of the stock, and the payment of sums equal to the dividends, should be secured by a mortgage of certain property of the borrower; and it proceeds accordingly to convey the property. The proviso for redemption is upon the mortgagor at the request of the mortgagee, transferring or *replacing*, or causing to be transferred or *replaced*, the stock; and until the same should be *replaced*, paying sums equal to the dividends; and the mortgagor covenants, at the request of the mortgagee, to transfer or cause to be transferred, or replaced, into the name of the mortgagee, the said sum of stock, and to pay the dividends. It is perfectly true that the £12,000 3 per cent. Consols, which had stood in the name of the testator, passed by this transaction into other hands, and no longer existed in the possession of either the lender [34]
or of the borrower; but it is equally true that transactions of this kind are treated and considered as loans of stock, and are so described; and accordingly the

mortgage deed in this, as in other such cases, speaks of *retransferring* and *replacing* the said sum of stock, whereas, in fact, the right of the mortgagee and the obligation of the mortgagor is that a certain new portion of stock should be transferred, or procured to be transferred, by the mortgagor into the name of the mortgagee; but as the arrangement secures to the mortgagee precisely the same amount of pecuniary value, and, upon being completed, will leave him in possession of property, not identically what he had before, but in every other respect the same in specie and value, he naturally considers that he has not parted with, but only lent his stock; and so considering it scarcely does more violence to the accuracy of language than in speaking of any sum of money lent as the lender's money, as he never expects to receive back precisely the money he advanced, but money of equal value and amount. In considering the terms of the will, upon which the question turns, the testator must be considered, either as the lender of stock, and therefore the owner of it, as a lending does not change the
[85] property in the thing lent, in which case there would be no difficulty, or at all events, as entitled by contract to have transferred into his name a certain amount of the stock; and it does not appear to me to be very material which supposition is adopted. The will is dated in 1832, and the testator in the first place gives £15,000 interest or share in the 3 per cent. Consols, which he directs shall be deemed a legacy of quantity, upon certain trusts: then, after disposing of an existing

sum in the 3½ per cents., he gives £3400 3 per cent. Reduced Annuities, which he also directs shall be deemed a legacy of quantity, upon certain other trusts. In a subsequent part of his will he directs, that if he should not *die possessed* of 3 per cent. Consols, and 3 per cent. Reduced sufficient from one or both of those funds to answer and satisfy the said sum of £15,000 3 per cent. Consols, and £3400 3 per cent. Reduced, then his executors shall purchase so much as will make up the deficiency, and the money necessary for that purpose he directs shall be raised out of his real estate, and creates a term of years for that purpose; and in declaring the trusts of the term, he directs that there shall be raised the full amount or, as the case may require, the deficiency of the said sum of £15,000 3 per cent. Consols, and £3400 Reduced 3 per cent. Annuities, "in case I shall not have, at the time of my [36] decease, as aforesaid, sufficient 3 per cent. Annuities in both or either of those funds to answer both those legacies." By the residuary clause he gives to the appellant all the residue of his personal estate and effects whatsoever and wheresoever, except the 3 per cent. Consols, 3 per cent. Reduced, and 3½ per cent. Annuities. It appears, by the report, that the testator, in 1834, purchased £3000 3 per cent. Consols, so that with the £12,000 the £15,000 3 per cent. Consols would be made up; and there is no question but that the legatees of the £15,000 3 per cent. Consols are entitled to have that sum realized either by the purchase out of the general estate or by application of the

£12,000; but the residuary legatee insists that the £12,000 3 per cents. due upon the mortgage passes to him under the residuary clause, and that that amount of stock is to be purchased for the legatees by means of money to be raised out of the real estate. Such could not have been the testator's intention. If the covenant in the mortgage deed had been performed, and the stock replaced, the question could not have arisen; and it is not possible to suppose that the testator intended the title of his devisee and residuary legatee to the value of such stock to depend upon the fact or the accident of such transfer being
[37] or not being made. *But the question is, are there words in the will to enable the Court to give effect to what must be supposed to have been the testator's intention?*[17] If the testator considered himself, as per-

[17] [No supposition, as to what may have been a testator's intention while writing his will, ought, it is submitted, to be based upon the subsequent course of events. *A fortiori*, no such supposition can affect the construction of what he actually wrote. The Courts are not only theoretically, but morally, in the dark with regard to his motives and intention, except as expressed by him in his written will.

"No man is bound to make a will in such a manner as to deserve approbation from the prudent, the wise, or the good. A testator is permitted to be capricious and improvident, and is moreover at liberty to conceal the circumstances and the motives by which he has been actuated in his dispositions. Many a testamentary provision may seem to the world arbitrary, capricious, and eccentric, for which the testator, if he could be heard, might be able to answer most satisfactorily. And this is one among the reasons that may be, and have been, judicially given against readily attributing to men mistakes in the language that they use in their

sons in his situation usually do, as having lent the stock, and therefore as being still owner of it, the expressions used in the will would accurately describe what, upon that supposition, he must have considered as his title and interest in the stock; and there is, I think, strong ground, from the expressions of the mortgage deed, for concluding that such was his understanding of his situation with relation to the stock; but if the transaction be considered with the utmost technical accuracy, the testator, when he made his will, held a contract under which he was entitled at any time to require the transfer into his name of £12,000 3 per cent. Consols, and in the meantime he had all the benefit which could arise from the fund if actually transferred. As against the other party to the contract, he had no right except to such transfer: he had no demand for any money: such party was not bound to pay him any, but might have discharged himself from the obligation by making the transfer. If his interest under such contract be not accurately

[wills, and against departing from the proper sense of their words without something more than conjecture; without something more than the mere opinion of the interpreter, however wise he may be, that the language construed according to the rules of idiom would make an eccentric or inconvenient provision,—reasons which may not always have been adhered to, which may possibly be at variance with some particular instances of construction now of settled application in some particular cases, but which are generally true and sound."—Per Sir J. L. Knight Bruce, in *Bird* v. *Luckie*, 8 Hare, 306; and see the observations of the same learned Judge in *Hart* v. *Tulk*, 2 De G. M. & Gor. 313; of Sir James Wigram, V.C., in *Hillersdon* v. *Lowe*, 2 Hare, 355, and of Lord Brougham in *Doe* d. *Winter* v. *Perratt*, 6 M. & Gr. 371.]

described as stock of which he was possessed, or
[88] which he *had*, which are the expressions used, is it more accurately described as personal estate excepting 3 per cent. Consols? for such are the terms of the residuary clause, and it is between those two gifts that the contest lies. If a testator, having contracted for the purchase of a large quantity of wool, should make his will bequeathing to one person all his personal estate except his wool, and to another all his wool, could there be any question as to the title to the wool so contracted for, although the party contracting to sell had it not himself, but had to procure it to enable him to fulfil his contract? What a party is entitled to under a contract he considers as his own. Lands contracted for will pass by a general devise of all the testator's lands, and of all the lands purchased by him, although he had other lands purchased and actually conveyed: *Atcherley* v. *Vernon*.[a] Why, then, if a testator contract for the purchase and transfer of a particular description of stock, and then bequeaths all he possesses or has of such stock, is it not to pass? The words of this will would clearly have passed stock standing in the names of trustees for the testator, and yet he would not have possessed or had the stock,
[89] in the sense contended for by the appellant; but the words would be construed to include stock to which he was entitled; and if so, the testator in this case was also entitled to the stock. I am, for these reasons, of opinion that the £12,000 3 per cent. Consols, secured

[a] 10 Mod. 518.

by the mortgage, is well bequeathed to make up the legacy of £15,000 3 per cent. Consols; and that the Vice-Chancellor's decree is right; and that this appeal must be dismissed with costs." As this case is under appeal to the House of Lords, the author abstains from making any remarks upon it.[b]

[b] In this case instructions were laid before counsel to prove by the declarations of the testator that he did not intend the £12,000 stock, secured by the mortgage, to pass as part of the £15,000 Consols. The interrogatories were not drawn, because the evidence was properly considered by counsel to be inadmissible.

[The above decree was affirmed on appeal, 9 Cl. & Fin. 88; S. C. 6 Jur. 673. Lord Lyndhurst, C., in giving judgment, said, after referring to the general circumstances of the case:—"The facts as to the state of the property were these:—The testator had purchased, some time before his death, £3000 3 per cent. Consols; he had, before that period, a sum of £12,000 3 per cent. Consols; he had lent that £12,000 3 per cent. Consols to a relation of his, upon condition that that sum of Consols should be retransferred and replaced at his request; and that, in the meantime, a sum equal to the dividends, and payable at the time that the dividends were payable, should be paid to him. Now, my opinion is, that having this property at the time of his death,—namely, the £3000 3 per cent. Consols, and being entitled, as I consider him entitled, to the other £12,000 3 per cent. Consols,—he had, within the meaning of this bequest, at the time of his death, £15,000 3 per cent. Consols, and that they would satisfy the terms of the legacy. Under such circumstances, I consider that the judgment of the Court below was right."

Lord Campbell, in expressing his concurrence with the above opinion, observed:—"It seems to me to be in conformity with the principle well established on the subject, and in accordance with all the decisions; and I think it would be most formidable if it were to be supposed that we are departing from the principle, that you cannot admit extrinsic evidence to show the sense in which a testator used any particular expression. I disclaim all intention of any such departure on this occasion. On the contrary, I have looked to the will; I have put an interpretation on it; and I apprehend that,

47. Opposed to the strong current of cases last referred to, stand the case of *Druce* v. *Dennison*,[c] and the cases upon the authority of which that case was decided.

48. In the case of *Druce* v. *Dennison* it was held, that, for the specific purpose of raising a case of *election*, extrinsic evidence was admissible to prove

[according to the just interpretation of that will, stock which the testator does possess under the circumstances which are here proved, would be 'possessed' by him at the time of his death.

"Then the reference is merely to inquire whether he had any such stock; and it is not at all to put an interpretation on the will, but to apply the language of the will. I apprehend that, according to common parlance, not putting any strained or secondary meaning on the language of the will, the testator may be supposed to say, that he is possessed of stock, which he held under the name of stock. 'Possessed' is a very flexible word. 'All that I die possessed of,' would be all the personal property which I have. 'All the stock which I die possessed of,' would be stock which I may have lent, and which is to be restored to me in consequence of a contract which I may have entered into; and it is a matter which cannot depend, I think, on the remedy, and upon whether a Court of Equity would decree a specific performance or not. It is admitted, that if it were a horse, or anything of that sort, that was the subject of the contract, the testator might be considered in possession of it; but even in that case the remedy would only be damages, to be raised from his lands in respect of a breach of the contract. It seems to me, therefore, that the view taken of the case by the Vice-Chancellor and by the late Lord Chancellor was perfectly correct."

The Courts, in this case, having professed to be governed by the principles enunciated by the learned author, it may be permissible, with unfeigned respect for the high authorities by which it was decided, to commend it to the careful consideration of the reader.

It is clear that there was nothing in the context of Mr. Collison's will, from which it was apparent that he had used the words "die

[c] 6 Ves. 385.

that the testator, by the words "my personal estate," meant personal estate subject to a power; and the case is referred to in support of that proposition, in a work of the first celebrity.[d] [40]

49. It may be questioned, however, whether Lord Eldon has not since repudiated the decision attributed to him by the report of that case in Vesey.[e] The case, at all events, applies to cases of election only. It will probably be followed in Courts of equity of original jurisdiction, but will not, it is hoped, be supported by the Court of last resort, if the point should ever call for determination there. The point is not of that nature which sometimes requires that a common error should be perpetuated.[18]

[possessed of" in any other than their strict and primary sense, and that his words, however strictly interpreted, were sensible with reference to extrinsic circumstances. The strict and primary sense of the above words was therefore the only sense in which they could legitimately be adopted by the Court. Was the testator, in any such sense, *possessed* of the £12,000 Consols at the date of his death? In fact, the £12,000 was sold and dispersed, the only bargain being, that the mortgagor should some day go into the market and buy stock, in the name of his mortgagee, to an equivalent amount. Fully admitting the flexibility of the word in question, might not this very case be cited as an instance of its primary and secondary use, if indeed it be necessary to concede that the testator was, in any correct sense, possessed of the £12,000?]

[d] Sugden on Powers, p. 385, 3rd edit. [Vol. ii. p. 349, 7th ed.]

[e] See per Lord Eldon in *Doe* d. *Oxenden* v. *Chichester*, 4 Dow, 65; and see *Blommart* v. *Player*, 2 Sim. & Stu. 597; and *Dummer* v. *Pitcher*, 2 Myl. & K. 262. [*Shuttleworth* v. *Greaves*, 4 Myl. & Cr. 37; *Maxwell* v. *Maxwell*, 16 Beav. 112; *Clementson* v. *Gandy*, infra, pl. 122; 1 Jarm. Wills, 2nd ed. 377.]

[18] [The doctrine of election may be thus illustrated:—

Suppose a testator to include in a devise to B. property which

50. The only positive exception to the Second Proposition, of which the writer is aware, exists in those cases in which a testator, *having no children*, devises property in default or failure of issue *of himself;* in

[really belongs to C., upon whom, by the same instrument, he confers a benefit. Equity will, in certain cases, compel C. to elect to take either under or against the will, *i. e.* either to fulfil the testator's intention with regard to B., or to relinquish, in B.'s favour, the benefit intended for himself. The question frequently arises, whether or no the devise to B. was really designed by the testator to include anything belonging to C. (vide e. gr. *Ellis* v. *Ellis*, 3 Hare, 310; *Jervoise* v. *Jervoise*, 17 Beav. 566; *Swan* v. *Holmes*, 19 Beav. 471; *Maxwell* v. *Maxwell*, 2 De G. M. & Gor. 705). In such cases, both upon principle and authority, extrinsic evidence of what the testator intended, as distinguished from what his words express, is inadmissible. But C. may, it is conceived, resist election by proving, if he can, that the disposition of his property, expressed upon the face of the will, is *not the will of the testator*. See infra, pl. 152.

In connection with the subject of election, that of satisfaction may be here adverted to, with the remark that the subject of this volume should be carefully distinguished from a class of cases with which it is sometimes improperly confounded, *i. e.* cases in which extrinsic evidence is admitted to rebut or support a legal presumption. This is, obviously, a very different matter from admitting such evidence to prove with what intention particular words were employed by a testator. In point of fact, the legal presumption above referred to, does not arise until after the meaning of the testator's words has been determined. It arises upon his words, properly interpreted. The common cases of a devise or bequest by a debtor to his creditor, or by a parent, or one *in loco parentis*, to a child whom he has previously undertaken to portion, will occur to the reader. In such cases, the presumption of law, arising from what the testator has actually done, may be repelled by evidence showing the intention with which he did it. And extrinsic evidence adduced for this purpose, may be replied to by like testimony advanced in support of the presumption. See, generally, as to the admissibility and office of extrinsic evidence with reference to the

which case the words, *in default of issue*, or *failure of issue*, contrary to their strict legal meaning, have been construed to mean issue *living at the death of the* [41] testator.[f] These cases are always spoken of as anomalies.

[purposes just adverted to: *Wallace* v. *Pomfret*, 11 Ves. 542; *Weall* v. *Rice*, 2 Russ. & Myl. 251; *Kirk* v. *Eddowes*, 3 Hare, 509; *Ex parte Pye*, 18 Ves. 140; S. C. 2 White & Tudor's Leading Cas. 262, and the notes thereon; Williams on Executors, part III. book 3, sect. viii.]

[f] *French* v. *Caddell*, 3 Bro. P. C. 257; *Wellington* v. *Wellington*, 4 Burr. 2165; S. C. 1 Blacks. 645; *Lytton* v. *Lytton*, 4 Bro. C. C. 441; *Jones* v. *Morgan*, 1 Bro. C. C. 206; *Sandford* v. *Irby*, 3 B. & A. 654. [*Doe* v. *Lucraft*, 1 M. & Sc. 573; 8 Bing. 386; *Egerton* v. *Jones*, 3 Sim. 409; *Rye's Settlement*, 10 Hare, 106; 2 Jarm. Wills, 2nd ed. pp. 426 et seq. The 7th Wm. 4 & 1 Vict. c. 26, s. 29, has, with reference to wills executed or republished on or after the 1st of January, 1838, placed this exception (which was originally admitted by the Courts in deference to the evident intention of the testator) under the protection of positive law. See the observations on this section in the volume just referred to, pp. 453 et seq.]

[42] ## PROPOSITION III.

Where there is nothing in the context of a will, from which it is apparent that a testator has used the words in which he has expressed himself in any other than their strict and primary sense, but his words, so interpreted, are insensible,[g] with reference to extrinsic circumstances, *a Court of law may look into the extrinsic circumstances of the case, to see whether the meaning of the words be sensible in any popular or secondary sense, of which,* with reference to these circumstances, *they are capable.*

51. This Proposition is proved by the cases incidentally referred to, in considering the Second Proposition.[h] The most striking examples, perhaps, are those in which a popular or secondary interpretation has been put on the words *child, son,* and *my* estate, and other similar cases. Thus, the word *child,* though
[43] in strict construction it means a *legitimate* offspring, may be applied to an *illegitimate* offspring where the circumstances of the case make it impossible that the

[g] The word 'insensible,' as here used, is a word of art, which the reader will find in common use in reported cases.

[h] Supra, pl. 24 et seq.

testator (who must have had some meaning) used it in such a strict and primary sense.[i]

52. So, *son* means an immediate descendant: where however, with reference to extrinsic facts, it is *impossible* that the word can have been used in such its proper sense, that construction of the word is, of absolute necessity, excluded; and the necessary inference, that the testator used the word in some improper or inaccurate sense, lets in the inquiry, in what sense the testator used it.[k]

53. So, property subject to a power is not, strictly speaking, *his* by whom the power is to be exercised. Now, suppose a testator having no real estate at the time of making his will, but having a power over the real estate of another, to devise *his* real estate over to A. Every devise of real estate being specific, the facts of such a case would exclude the presumption that the testator had used the word *his* in its proper sense, [44] and would let in the secondary and only other interpretation of which the word under the circumstances is capable.[l]

[i] *Wilkinson* v. *Adam*, 1 Ves. & B. 422; [*Warner* v. *Warner*, 15 Jur. 141;] *Woodhouslee* v. *Dalrymple*, 2 Mer. 419; *Beachcroft* v. *Beachcroft*, 1 Madd. 430; *Bayley* v. *Snelham*, 1 Sim. & Stu. 78. [See observations on this case, 2 Jarm. Wills, 2nd ed. 198; *Earl of Orford* v. *Churchill*, 3 Ves. & B. 69; *Pratt* v. *Mathew*, 22 Beav. 328.]

[k] *Steede* v. *Berrier*, 1 Freem. 292 & 477; 8 Vin. Abr. 310, pl. 9.

[l] [See ante, page 19, note [6].] *Lewis* v. *Llewellyn*, 1 Turn. 104; *Napier* v. *Napier*, 1 Sim. 28; Sugden on Powers, chap. v. sect. 56, n.

54. Other analogous cases might be cited.[m]

55. In *Gill* v. *Shelley*, Rolls, 28th January, 1831,[1] Elizabeth Merricks gave the residue of her real and personal estate to her husband, James Merricks, for life, and directed, that after his death the residue should be divided amongst certain classes of persons mentioned in her will, and added, "amongst whom I include the *children* of the *late* Mary Gladman." Elizabeth Merricks died in the year 1817, and James Merricks died in the year 1820. The bill was filed by the trustees under the will of Elizabeth Merricks praying the directions of the Court in distributing the residue of her estate. The defendant, Charlotte Shelley, was an illegitimate child of Mary Gladman, born before marriage, and claimed a part of the residue as a person described in the will
[45] under the words "*children of the late Mary Gladman.*" The claim of Charlotte Shelley was opposed by the personal representatives of James Gladman, deceased, who was the *only legitimate child* born of Mary Gladman. It was stated in the answer of Charlotte Shelley, and proved by the witnesses in the cause, that she was born before the marriage of Mary Gladman, and that the facts of her birth and illegitimacy, and of the subsequent marriage of her mother, and of the birth of James Gladman, and that Mary Gladman had but *one* legitimate child, were all known to the testatrix, who was on terms of intimacy with Mary Gladman

[m] *Reeves* v. *Brymer*, 4 Ves. 692, and the cases there referred to; *Wilde's case*, 6 Rep. 16; 8 Viner's Abr. 310, pl. 7.

[1] [2 Russ. & Myl. 336.]

from a period before the marriage until her death, and clothed and maintained Charlotte Shelley. Mr. Pemberton and Mr. Wigram, for Charlotte Shelley, cited *Woodhouslee* v. *Dalrymple*, 2 Mer. 419, and contended that, as no state of circumstances existed before or at the date of the will, or could possibly arise after the date of the will, with reference to which the testatrix could have used the word "*children*" in its proper sense, the Court must look into the circumstances of the testatrix's family, and see whether any person had, by reputation, gained the name of a child of Mary Gladman, as otherwise the word "*children*" in the will could not be satisfied. Mr. Bacon, for the representatives of James Gladman, cited *Wilkinson* v. [46] *Adam*, 1 Ves. & B. 422; *Swaine* v. *Kennerley*, ib. 471; and *Hart* v. *Durand*, 3 Anst. 684; and contended, upon the authority of those cases, that legitimate and illegitimate children could not take together under the general description of children. Mr. Pemberton, in reply, said, that the rule that children and illegitimate children could not take together under the general description of children, applied only to cases in which the word was used to describe a class, and not where (as in the case before the Court) the word clearly described particular individuals; that if, in *Wilkinson* v. *Adam*, the testator had survived his wife and married Ann Lewis, the legitimate children of that marriage would have taken jointly with the illegitimate children in whose favour the cause was decided; 1 Ves. & B. 454; that *Swaine* v. *Kennerley* was distinguishable

from the case before the Court, because it did not appear that in that case the facts were known to the testator; and that *Hart* v. *Durand* did not apply, because the evidence in that case was tendered to prove *the testator's intention* to comprehend illegitimate children. The Master of the Rolls said, that if *Swaine* v. *Kennerley* and *Hart* v. *Durand* had not been distinguishable from the case before him, he should have felt no [47] hesitation in overruling them: and decreed that Charlotte Shelley, *though illegitimate*, was entitled to share in the residue of the testatrix's estate jointly with the representative of James Gladman.[2]

[2] [See *Dover* v. *Alexander*, 2 Hare, 283; *Leigh* v. *Byron*, 1 Sm. & Gif. 486.]

PROPOSITION IV. [48]

Where the characters in which a will is written are difficult to be deciphered, or the language of the will is not understood by the Court, the evidence of persons skilled in deciphering writing, or who understand the language in which the will is written, is admissible to declare *what the characters are, or to inform the Court of the proper meaning of the words.*[1]

56. This Proposition (which, in truth, is involved in the first Proposition stated above) scarcely needs authority to support it. The evidence merely *declares* what the characters or words are; and for the purpose of ascertaining that, a Court may call a witness, as it would look into a book or dictionary for the same purpose.

57. *Masters* v. *Masters*,[a] *Norman* v. *Morrell*,[b] and *Goblet* v. *Beechey*,[c] are authorities for the first branch [49] of the Proposition.[d]

[1] [See per Maule, J., 9 Cl. & Fin. 502; per Tindal, C. J., ib. 566; 1 Greenleaf on Evid. 3rd ed. 401.]

[a] 1 P. Williams, 421. [b] 4 Ves. 769.

[c] Appendix, infra, No. I. [3 Sim. 24; S. C., on appeal, 2 Russ. & Myl. 624.]

[d] In a recent case in which a question arose (upon the obscurity of the handwriting) what the words of an instrument were, the *Court* decided the point, and refused to let it go to the jury. *Reman* v. *Hayward*, 2 Adol. & Ellis, 666, n. [a]. [On the ques-

58. The common practice of the Courts in receiving translations of instruments written in foreign languages proves the second branch of the Proposition.

[tion whether, and in what cases, the Court will look at an original will of personal estate with a view of deriving from the form, character, or manner of writing, or from what otherwise may appear thereon, aid in determining the meaning or construction of the will, see *Phillipps* v. *Chamberlaine*, 4 Ves. 57; *Compton* v. *Bloxham*, 2 Coll. 204; *Oppenheim* v. *Henry*, cited 9 Hare, 802, note; *Gann* v. *Gregory*, 3 De G. M. & Gor. 780; *Shea* v. *Boschetti*, 18 Beav. 321; 2 Phil. Evid. ch. 1, s. iii. In *Gauntlett* v. *Carter*, 17 Beav. 586, the punctuation of a will was relied upon in the judgment. In *Langston* v. *Langston*, 2 Cl. & Fin. 240, Lord Brougham looked at the *draft* of the testator's will. "I had," said his Lordship, "a curiosity to see the draft from which the engrossment was made, and one party were exceedingly anxious that my curiosity should be gratified; but that anxiety was met by just an equal anxiety on the opposite side that it should remain unsatisfied. I at once, therefore, proceeded to have a still greater anxiety and curiosity, because I plainly saw it was likely to be a decisive matter. I was aware, as a lawyer, that I had no right to look at it; but, humanly speaking, it was impossible not to wish to see whether one's extra-judicial conjecture was well founded, namely, that the whole history of this was an error in copying; and accordingly, when I looked at it, I found that there was a limitation to the first son of a testator's son, J. H. Langston, which the person who made the engrossment had for a very obvious reason passed over in copying it, having in his haste gone from the same word in one line to the same word in another, in mistake. I here lay that entirely out of view. It has no right to enter into the consideration of the case, and I can positively assure your Lordships that I have formed my opinion upon the instrument as it now stands, without matter *dehors*, without having recourse to the draft. I have no right to look at the draft, but anybody who reads this will cannot, if he has his senses about him, doubt that some mistake must have happened; and that is a legitimate ground in construing an instrument, because that is a reason derived not *dehors* the instrument, but one for which you have not to travel from the four corners of the instrument itself."]

So, within the same principle, if a testator express himself in terms, with which, as a member of a particular trade or calling, he is familiar, the evidence of persons acquainted with the proper meaning of such terms is admissible to interpret them.[e]

[e] *Att.-Gen.* v. *Plate Glass Co.*, 1 Anst. 39; *Goblet* v. *Beechey*, App. infra; S. C. 3 Sim. 24; *Smith* v. *Wilson*, 3 B. & Adol. 728; and *Richardson* v. *Watson*, 4 B. & Adol. 787. So, in the recent case of *The King* v. *Mashiter*, 6 Ad. & Ellis, 153, the Court, upon the construction of a charter, held that a word of uncertain meaning ('inhabitant') must be interpreted by extrinsic evidence of usage, or by reference to the context and objects of the charter. The cases of mercantile contracts are in point. See *Clayton* v. *Gregson*, 5 Adol. & Ellis, 302, and the cases there cited by counsel. In *Clayton* v. *Gregson*, it was held, that, in construing a mining contract, evidence was admissible to show the meaning of the word "level," as understood by coal-miners. It was held, however, that the finding, as to the meaning of the word "level," did not, under the circumstances, raise a conclusion of *law*, that the contracting [50] parties used the term according to such meaning, but was only evidence from which a jury might draw that conclusion. That is, it is an extrinsic fact material to the right interpretation of the words of the contract. Infra, Prop. V.

[So, "the testator may have habitually called certain persons or things by peculiar names, by which they were not commonly known. If these names should occur in his will, they could only be explained and construed by the aid of extrinsic evidence to show the sense in which he used them, in like manner as if his will were written in cipher or in a foreign language. The habits of the testator in these particulars must be receivable as evidence to explain the meaning of his will" (per Lord Abinger, C.B., in *Doe* d. *Hiscocks* v. *Hiscocks*, 5 M. & W. 363). In the recent case of *Kell* v. *Charmer*, 23 Beav. 195, the testator by his will expressed himself as follows:—"I give and bequeath to my son William the sum of *i. x. x.* To my son Robert the sum of *o. x. x.*" The letters *i. x. x.* and *o. x. x.* were written in pencil in the original will, but were included in the probate.

The testator, in his lifetime, had carried on the business of a

jeweller, and had, in the course of such business, used certain private marks or symbols to denote prices, etc.; and extrinsic evidence was tendered to prove that, according to such system, the letters *i. x. x.* and *o. x. x.* represented the sums of £100 and £200 respectively. The cases of *Goblet* v. *Beechey*, (Appendix, infra, No. I.); *Clayton* v. *Nugent*, 13 M. & W. 200; *East* v. *Twyford*, 9 Hare, 712, 4 Ho. Lo. Cas. 517, and *Shore* v. *Wilson*, 9 Cl. & Fin. 355, 555, were cited. Sir John Romilly, M.R., admitted the evidence.]

PROPOSITION V. [51]

For the purpose of determining the object of a testator's bounty, or the subject of disposition, or the quantity of interest intended to be given by his will, a Court may inquire into every material[a] *fact relating to the person who claims to be interested under the will, and to the property which is claimed as the subject of disposition, and to the circumstances of the testator, and of his family and affairs, for the purpose of enabling the Court to identify the person or thing intended by the testator, or to determine the quantity of interest he has given by his will.*[1]

The same (it is conceived) is true of every other disputed point, respecting which it can be shown that a knowledge of extrinsic facts can, in any way, be made ancillary to the right interpretation of a testator's words.

59. The evidence under the Proposition last considered (the Fourth) is applicable only to the purpose

[a] Infra, pl. 98.

[1] [See per Lord Wensleydale, in *Shore* v. *Wilson*, 9 Cl. & Fin. 556, and in *Grey* v. *Pearson*, 6 Ho. Lo. Cas. 106; per Sir W. P. Wood in *Webb* v. *Byng*, 1 Kay & Joh. 585; *Martin* v. *Drinkwater*, 2 Beav. 215; *Pasmore* v. *Huggins*, 21 Beav. 103; *Blundell* v. *Gladstone*, 11 Sim. 467; S. C. nom. *Camoys* (Lord) v. *Blundell*, 1 Ho. Lo. Cas. 778; *Doe* d. *Evans* v. *Evans*, 10 Ad. & Ell. 228; *Innes* v. *Sayer*, 3 Mac. & Gor. 606.]

[52] of determining the meaning of the characters and words *in the abstract.* The purpose of resorting to the evidence now under consideration is to determine their meaning *in the will.*

60. This Proposition, when examined, will be found to be involved in the Second and Third Propositions, which have already been stated. For, if the strict and primary sense of a testator's words is to prevail in construction wherever the circumstances of the case admit of their being so construed, (Second Proposition), extrinsic evidence *must* be admissible, to inform the Court whether this rule of law can be applied or not. And if, where the circumstances of the case make it impossible that the words of the will could have been used by the testator in their strict and primary sense, a popular or secondary sense may be put upon them (Third Proposition), extrinsic evidence of the state of the testator's family and affairs must be admissible, or a Court would be without the means of judging in what popular or secondary sense (if any) the testator may have used the words. Cases, illustrating this Proposition, have occurred in considering the two Propositions just referred to. A few additional examples, however, with some observations upon them, will assist in elucidating the subject.

[53] 61. *Example* 1.—Where the *person* or *thing* intended by the testator is the point of contention, the office of the Court is simply to *declare* what person or thing is described in the will.

62. The Proposition now under consideration asserts, that, in all cases calling for such a declaration, evidence as to the nature, name, marks, qualities, etc., of the subject mentioned in the will (whether person or thing) is admissible, in order to enable the Court to determine whether the description in the will applies or not.[b]

63. If a man devise his estate, *correctly* described as the manor of Dale, evidence must be admissible to show that a subject exists which answers the description in the will.[c] This needs no authority.

64. *Example* 2.—If the description in the will is *incorrect*, evidence, that a subject—having such marks upon it—exists, must be admissible, that the Court may determine whether such subject, though *incorrectly* described in the will, be that which the testator [54] intended. No question can be raised for the opinion of the Court without such evidence.

65. In the legitimate application of this process, a nickname has been held a sufficient description of the object of a testator's bounty,[d] it being proved that the

[b] *Fonnereau* v. *Poyntz*, 1 Bro. C. C. 472; *Herbert* v. *Reid*, 16 Ves. 481; *Sandford* v. *Raikes*, 1 Mer. 653; *Press* v. *Parker*, 10 Moore, 185; *Doe* d. *Templeman* v. *Martin*, 4 B. & Adol. 77. [*Reynolds* v. *Whelan*, 16 L. J. Ch. 434, infra, Prop. VII. note.]

[c] See per Coleridge, J., in *Preedy* v. *Holton*, 4 Adol. & Ellis, 82.

[d] *Edge* v. *Salisbury*, Amb. 70; *Dowset* v. *Sweet*, Id. 175; *Baylis* v. *Attorney-General*, 2 Atk. 239; *Maybank* v. *Brooks*, 1 Bro. C. C. 84; *Goodinge* v. *Goodinge*, 1 Ves. sen. 230; *Parsons* v. *Parsons*, 1 Ves. jun. 266; [and see 1 Hoven. Supp. 112;] *Doe* d. *Beach* v. *Lord Jersey*, 3 B. & C. 870. And see *Hiscocks* v. *Hiscocks*, infra, pl. 183.

testator was in the habit of calling the legatee by such name.[2]

66. So, also, a name gained by reputation, though not strictly appropriate,[e] may be a sufficient description of the person intended.

67. So, a description, though false in part, may, with reference to extrinsic circumstances, be absolutely certain, or, at least, sufficiently so to enable a Court to identify the subject intended; as where a false description is superadded to one which by itself would have been correct.[3] Thus, if a testator devise his

[2] [*Lee* v. *Pain*, 4 Hare, 252.]

[e] *Rivers's case*, 1 Atk. 410; *Crounden* v. *Clerke*, Hob. 32. [4 Hare, 248; *Queen's College* v. *Sutton*, 12 Sim. 521.]

[3] [In *Kennell* v. *Abbott*, 4 Ves. 802, testatrix gave a legacy to a man whom she described as 'my husband,' Edward Lovell, supposing him to be in fact such, whereas at the time of his marriage with the testatrix, he had had a wife living. Sir R. P. Arden, M.R., said:—"The first question is, whether this legacy is or is not a legacy which this man can claim under the circumstances that it is given him *as the husband of the testatrix, though he does not possess that character*. I thought it a case rather novel in its circumstances and that scarcely has afforded any decision in the law of England, though there are some dicta in the Civil Law that seem to bear upon the point. The passage cited from the Digest (Book xxxv., tit. 1, l. 72, s. 6) is, 'Falsam causam legato non obesse verius est, quia ratio legandi legato non cohæret: sed plerumque doli exceptio locum habebit, si probetur alias legaturus non fuisse.'

"The meaning is, that a false reason given for the legacy is not, of itself, sufficient to destroy it; but there must be an exception of any fraud practised from which it may be presumed that the person giving the legacy would not, if that fraud had been known to him, have given it. That, from a book of great authority, seems to be the principle of the Civil Law.

"The question is, whether, according to the law of England, that can apply to a case like the present, and whether the law will per-

black horse, having only a *white* one,[f] or devise his *freehold* houses, having only *leasehold* houses,[g] the white horse in the one case, and the leasehold houses [55] in the other, would clearly pass. In these cases the

[mit a man who obtains a legacy in such a manner, to have the benefit of it.

"I have not been able to find anything that bears any very decisive analogy to this, but, upon general principles, I am of opinion that it would be a violation of every rule that ought to prevail as to the intention of a deceased person, if I should permit a man availing himself of that character of husband of the testatrix, and to whom in that character a legacy is given, to take any part of the estate of a person whom he so grossly abused, and who must be taken to have acted upon the duty imposed upon her in that relative character. I desire to be understood not to determine that where, from circumstances not moving from the legatee himself, the description is inapplicable, as where a person is supposed to be a child of the testator, and from motives of love and affection to that child, supposing it his own, he has given a legacy to it, and it afterwards turns out that he was imposed upon and the child was not his own, I am not disposed by any means to determine that the provision for that child should totally fail; for circumstances of personal affection to the child might mix with it, and which might entitle him, though he might not fill that character in which the legacy is given. My decision, therefore, totally avoids such a point. Neither would I have it understood that if a testator, in consequence of supposed affectionate conduct of his wife, being deceived by her, gives her a a legacy as to *his chaste wife*, evidence of her violation of her marriage-vow could be given against that. It would open too wide a field. But this decision steers clear of that point. This is a legacy to her supposed husband and under that name. He was the husband of another person. He had certainly done this lady the grossest injury a man can do to a woman, and I am called upon now to determine whether the law of England will permit this

[f] *Door* v. *Geary*, 1 Ves. sen. 255; Touch. 432.

[g] *Day* v. *Trig*, 1 P. Wms. 286. [*Doe* d. *Gunning* v. *Lord Cranstoun*, 7 M. & W. 1; and see per Sir J. L. Knight Bruce, in *Hall* v. *Fisher*, supra, page 24, n. [9].]

substance of the subject intended is certain, and, *if there be but one such substance*,[h] the superadded description, though false, introduces no ambiguity; and as, by the supposition, the rejected words are inapplicable to any subject, the Court does not alter, vary, or add to the effect of the will by rejecting them. To such cases, the maxim, *falsa demonstratio non nocet*, may, with propriety, be applied;[i] and this is the proper limit of that maxim.[k]

[legacy to be claimed by him. Under these circumstances I am warranted to make a precedent, and to determine that wherever a legacy is given to a person under a particular character which he has falsely assumed, and which alone can be supposed the motive of the bounty, the law will not permit him to avail himself of it, and therefore he cannot demand his legacy." And see *Giles* v. *Giles*, 1 Keen 685; *Penfold* v. *Giles*, 6 L. J. N. S. Ch. 4; *Rishton* v. *Cobb*, 9 Sim. 615.]

[h] See per Lord Kenyon, C. J., in *Thomas* v. *Thomas*, 6 T. R. 376.

[i] See further, Hob. 32; 8 Vin. Abr. 310, pl. 4; 2 Eq. Abr. 415, pl. 6; *Gynes* v. *Kernsley*, 1 Freem. 293: *Parsons* v. *Parsons*, 1 Ves. jun. 266; *Dowset* v. *Sweet*, Amb. 175; *Garth* v. *Meyrick*, 1 Bro. C. C. 30; *Stockdale* v. *Bushby*, 19 Ves. 381; S. C. Cooper, 229; *Smith* v. *Campbell*, 19 Ves. 403; *Welby* v. *Welby*, 2 Ves. & B. 191; 1 Inst. 3 a; Com. Dig. *Estate* (I); *Richardson* v. *Watson*, 4 B. & Adol. 779; *Miller* v. *Travers*, 8 Bing. 244; *Doe* d. *Smith* v. *Galloway*, 5 B. & Adol. 43. [See per Alderson, B., in *Morell* v. *Fisher*, 4 Exch. 604. *Schloss* v. *Stiebel*, 6 Sim. 1; *Newbolt* v. *Pryce*, 14 Sim. 354; *King* v. *Wright*, ib. 400; *Hopkinson* v. *Ellis*, 5 Beav. 34; *Bristow* v. *Bristow*, ib. 291; *Ryell* v. *Hannam*, 10 Beav. 536; S. C. 16 L. J. Ch. [491; *Gal-*

[k] See further, S. P., infra, pl. 133.

[Upon the principle expressed in this maxim, must, it is conceived, rest the established rule, that where a testator in terms bequeaths to part only of a number of individuals, described as composing a particular class, *e. gr.* "to the *three* children of A.," who has four children at the date of the will, and none of the in-

68. So, where the same thing has two names, as, if I give lands to Christ Church in Oxford, and the name of the corporation is *Ecclesia Christi in Universitate Oxford*, evidence may be given of the fact, that the precinct of Oxford and the University of Oxford [56] are one and the same.[1]

69. If a testator, having freehold and leasehold property in the same place, devise all his messuages, lands, tenements, and hereditaments in that place to uses applicable only to freehold property, the leasehold property will not generally pass; but if, in fact, the leasehold property had been blended in enjoyment with the freehold, the leasehold property will pass, al-

lini v. *Noble*, 3 Mer. 691; *Bradshaw* v. *Thompson*, 2 Y. & Coll. N. C. 295; *Goodlad* v. *Burnett*, 1 Kay & Joh. 341; *In re the trusts of the will of Bridget Feltham*, ib. 528; *Reynolds* v. *Whelan*, infra, Prop. VII.; *Attorney-General* v. *Pyle*, 1 Atk. 435; *Adams* v. *Jones*, 9 Hare, 485; *Bernasconi* v. *Atkinson*, 10 Hare, 345; *General Lying-in Hospital* v. *Knight*, 21 L. J. Ch. 537; *Lane* v. *Green*, 15 Jur. 763. *Re Blackman*, 16 Beav. 377, might probably have been supported under the above maxim, without reference to evidence of intention, which it is submitted was, under the circumstances, inadmissible.]

[tended legatees are named nor can be identified, either by the context of the will or by extrinsic evidence, it is to be presumed that he intended a benefit to the entire class, and that his *numerical* description of it must be wholly disregarded. In such a case the restrictive expressions are accordingly rejected, as merely inaccurate, and the entire number of individuals answering the description are admitted as legatees. In *Garvey* v. *Hibbert*, 19 Ves. 124, under a legacy "to the *three* children of A. the sum of £600 each," the *four* children of A. were held entitled to £600 apiece. See also *Lee* v. *Pain*, 4 Hare, 249; *Morrison* v. *Martin*, 5 Hare, 507; *Daniell* v. *Daniell*, 3 De G. & Sm. 337; *Yeats* v. *Yeats*, 16 Beav. 170.]

[1] Infra, pl. 197.

though the limitations be to uses strictly applicable to freehold property only.[m]

70. The admissibility of evidence of the nature and for the purposes here adverted to, without transgressing the strictest limits of exposition, must, it is conceived, be obvious. Exposition—as applied to cases in which the only question is, whether a given subject is sufficiently described in a will—can mean nothing else than deciding upon the aptness of the testator's expressions to identify the subject in question. The only point to be decided, in such cases, is, whether the description in the will does or does not correspond with that of the subject it is said to describe. The [57] most accurate description possible must require some development of extrinsic circumstances to enable a Court to decide upon its sufficiency; and the least accurate description, which is sufficient to satisfy the the mind of a judge or jury as to a testator's meaning, must be within the same principle. The principle cannot be affected by the consideration that a more ample development of circumstances is necessary in one case than in another. In such cases, provided the judgment of a Court, or the finding of a jury, be founded upon a comparison of the description in the will with that of the subject which it is said to describe, the general principle of exposition above stated is strictly adhered to, and the intention of the testator

[m] *Hobson* v. *Blackburn*, 1 Myl. & K. 571. [*Pye* v. *Bird*, 2 Black. 130; *Goodman* v. *Edwards*, 2 Myl. & K. 759; *Arkell* v. *Fletcher*, 3 Jur. 1099; *Hall* v. *Fisher*, 1 Coll. 47.]

never comes in question *except as it is expressed in his will.*

71. *Example* 3.—As a knowledge of the nature, name, etc., of the subject intended by the testator is necessary for the purpose of enabling a Court to identify it; so, a knowledge of the circumstances by which a testator was surrounded at the time of making his will; the situation in which he stood with respect to the objects to which his will refers; and, generally, a knowledge of the state and circumstances of the testator, his family, and affairs, *may* be necessary for the same purpose.

72. Thus, the strict and primary sense of the word [58] *child* is legitimate offspring.[n] Now, if a testator, having no legitimate child at the time of making his will, devise an estate to his child, describing such child in his will as a person then in being, or in any other terms amounting to a *designatio personæ*, the extrinsic circumstances of the case would necessarily exclude the primary sense of the word, and (as the testator must have meant *some* person) would let in the inquiry whether, in any popular or secondary sense of which the words were capable, they pointed out the testator's intention with certainty.

73. Again, suppose a testator to devise an estate to A.B., there being two persons, father and son, of the same name, and that the son only was known to the testator;—Or, suppose a testator resident in India, to

[n] 1 Ves. & B. 466, and the references there. [3 Ves. & B. 67.]

bequeath to A. B., who was also in India, some specific chattel, *e.g.* a gold watch, and that the testator had with him, in constant use, a specific chattel of the kind described, and that he was also owner of another of the same description, which he had left in England twenty years before;—The meaning of the testator's [59] words in both these cases, though equivocal in the abstract, is definite with reference to the circumstances under which they were used.[o]

74. In *Doe* d. *Gore* v. *Langton*,[p] the testator by his will, which was dated in February, 1831, devised "all that my manor or reputed manor of Barrow Minchin, in the county of Somerset, together with the mansion-house, called Barrow-Court, thereto belonging, and the park, and also all and singular my freehold messuages, lands, tenements, and hereditaments thereunto belonging, situate, lying, and being in the parish of Barrow Minchin and Barrow Gurney, in the county of Somerset aforesaid." The lands in question in the cause adjoined to, and were in some parts intermixed with, the ancient Barrow estate, which had been in the testator's family for several generations; they were situate in the parish of Barrow Minchin and Barrow Gurney, but were not within the manor of Barrow Minchin, and were purchased by the testator in October, 1800.

[o] See and consider *Lepiot* v. *Browne*, 1 Salk. 7; *Thomas* v. *Steward*, 7 T. R. 144, n. (6); *Fonnereau* v. *Poyntz*, 1 Bro. C. C. 471; S. C. 6 Vesey, 401; 1 Mer. 389, 380; and see 8 Ves. 23; 10 Moore, 166. [*King's College Hospital* v. *Wheildon*, 18 Beav. 33; *Jefferies* v. *Michell*, 20 Beav. 15.]

[p] 2 B. & Adol. 680.

The testator had some lands within both the parish [60]
and manor of Barrow Minchin. The argument for the plaintiff (the devisee) proceeded upon the manifest intention of the testator to dispose of all his estates, and the flexible meaning of the words "thereunto belonging." The counsel for the defendant (the heir-at-law) contended that the words "thereunto belonging" could not apply to newly purchased estates, which had never been held with the manor, or even been in the family of the testator before the purchase in October, 1800. That being conceded, it was contended that the description of the lands consisted of two necessary terms: one, that they be within the parish of Barrow Minchin and Barrow Gurney; another, that they belong to the manor of Barrow Minchin; that, as there were lands that corresponded in both particulars with this description, and which undoubtedly passed by the devise, the words of the will were satisfied without being construed as carrying the lands in question; and that if they did not correspond with the description in both particulars, that is, if they did not belong to the manor and lie within the parish, evidence that the lands in question answered the description in the will, and that they had been occupied and formed one estate with the manor, was undoubtedly admissible; but no such evidence was or could be given. Lord [61]
Tenterden, C. J., in delivering the judgment of the Court, said: "Our opinion in this case is founded upon the will of the testator, together with such only of the extrinsic facts as furnish the date of the pur-

chase and the situation of the lands in question, and show that William Gore Langton, the defendant, was the eldest son of the testator, and had married a lady of fortune, and taken her surname of Langton in addition to his own; and that the ancient seat of the Gore family was at Barrow—the eldest son resided at Newton Park; *and all these facts were undoubtedly admissible in evidence.*"[q] After noticing some of the extrinsic facts of the case his Lordship proceeded: "The question arises upon the use of the words, *thereunto belonging*, in the devise under which the plaintiff claims. It sometimes happens, that the language of one will is so nearly like that of another, as to make a decision upon the first a plain authority to govern the second; but this does not always happen, and very small changes of language have often led to a difference of interpretation. *The extrinsic facts in this case* leave no room to doubt that the testator intended [62] his newly-acquired property to pass by his will, as part of his Barrow estate; but, nevertheless, it cannot pass, unless that meaning can be collected from the will itself; and there are two clauses in the latter part of the will, which appear to manifest that intention, and to be sufficient to authorize us to put such a construction on the words *thereunto belonging* as will accord with, and give effect to, that intention."

75. The admissibility of extrinsic facts in the cases stated under the third example, and in any cases analogous to them, without transgressing the strict limits

[q] See *Lowe* v. *Lord Huntingtower*, 4 Russ. 532, n.

of exposition, if not equally obvious as in those falling under the first example, is equally certain.

76. In considering questions of this nature, it must always be remembered, that the words of a testator, like those of every other person, tacitly refer to the circumstances by which, at the time of expressing himself, he is surrounded. If, therefore, when the circumstances under which the testator made his will are known, the words of the will do sufficiently express the intention ascribed to him, the strict limits of exposition cannot be transgressed, because the Court, in aid of the construction of the will, refers to those extrinsic collateral circumstances, to which it is certain the language of the will refers. It may be true, that, [63] with such evidence, the precise meaning of the words could not be determined; but it is still the will which expresses and ascertains the intention ascribed to the testator. A page of history (to use a familiar illustration) may not be intelligible till some collateral extrinsic circumstances are known to the reader. No one, however, would imagine that he was acquiring a knowledge of the writer's meaning *from any other source than the page he was reading*, because, in order to make that page intelligible, he required to be informed to what country the writer belonged, or to be furnished with a map of the country about which he was reading.[r] The distinction pointed out in a former page[s] between the application of evidence to *explain a*

[r] See *Hiscocks* v. *Hiscocks*, infra, pl. 183.

[s] Supra, pl. 9, 10.

testator's words, and its application *to prove intention as an independent fact*, should here be recalled. The evidence for the admissibility of which we are now contending is of the former description. It does not *per se* approach the question of *intention*. It is wholly collateral to it. It explains the words only by removing the cause of their *apparent* ambiguity, where, in truth, there is no *real* ambiguity. *It places the* [64] *Court which expounds the will in the situation of the testator who made it, and the words of the will are then left to their natural operation.*[t]

77. The propriety, and indeed the necessity, of thus referring to extrinsic circumstances, is strongly enforced by the consideration, that the same words, properly interpreted, mean different things under different circumstances. Thus, in the case of a bequest of 'stock,' 'jewels,'[u] or 'household furniture,'[x] different subjects are meant by a testator, accordingly as he may be a farmer or a merchant, a nobleman or a jeweller.[4] To these observations also may be added the consideration that a bequest of 'stock,' 'jewels,' 'household furniture,' or any analogous bequest, though it may convey no certainty of the testator's intentions to the mind of a *stranger*; yet to any member of the tes-

[t] See pl. 96, note, and *Gore* v. *Langton*, ante, pl. 74.

[u] In *Colpoys* v. *Colpoys*, Jac. 461.

[x] *Kelly* v. *Powlett*, Amb. 605.

[4] [Similarly, a conclusion may be drawn, as to the meaning of the testator's words, from the profession or position in life of the legatee. See the case of a bequest of "books," *Willis* v. *Curtois*, 1 Beav. 193.]

tator's family, or any friend to whom he may have entrusted the execution of his will, the intention may be as clear and certain *by force of the words of the will alone*, as if the legatees in the one case, and the legacies in the other, had been described with the greatest technical precision. In the case suggested in [65] a former page[y] of a bequest of a gold watch, no testator, if he had intended to bequeath the watch he had left in England, could possibly have thought the description he had used sufficient; any testator, however, intending that which he had with him in India, might reasonably think he had sufficiently described it, even if the fact that he was owner of the other also were present to his mind. To reject or exclude a knowledge of collateral circumstances in cases like these, would often make the sufficiency of a will depend upon the *casual* knowledge of an executor or trustee, rather than the sufficiency of the testator's words. The construction of wills giving legacies in the nature of portions may be used to illustrate the propositions now under consideration; the relation in which the testator and legatee stand to each other being made the ground of a peculiar construction.[z]

78. The decision, in cases such as those suggested under the second example, would be, not that the testator *intended* merely to express this or that purpose, but that he *had*—perhaps inaccurately—expressed it.

79. The following hypothetical case may, perhaps,

[y] Supra, page 73.

[z] *Stones* v. *Heurtley*, 1 Ves. sen. 167. [Vide supra, page 54, n. [18].]

[66] be considered as illustrating the extreme point to which the legitimate use of extrinsic evidence could be carried in cases falling within the example now under consideration. Suppose a legacy '*to one of the children of* A.,' by her *late* husband B. Suppose, further, that A. had only one son by B., and that the fact was known to the testator. The necessary consequence, in such a case, of bringing the words of the will into contact with the circumstances to which they refer, must be to determine the identity of the person intended. No principle or rule of law would, it is conceived, preclude a Court from acting upon the evidence of facts by which the meaning of an *apparently ambiguous* will would, in such a case, be reduced to certainty. It is the form of expression only, and not the intention, which is ambiguous. It would be quite another question if A. had more sons than one, or if her husband were living.[a]

80. All the above observations are equally applicable to cases in which the description of the person or the thing intended by the testator is *upon the face of the instrument* inaccurately or imperfectly described[b] as to other cases; the authorities show, in the clearest manner, that evidence of the nature here spoken of is, *in such cases*, admissible.[c]

[a] 2 Vern. 625.

[b] As to the distinction between an *ambiguous* description, and one which is merely *inaccurate*, see infra, pl. 208.

[c] *Fonnereau* v. *Poyntz*, 1 Bro. C. C. 472, and see S. C. cited and commented on by Lord Eldon, 6 Ves. 401; *Attorney-General* v. *Grote*, 3 Mer. 316; S. C. on appeal, infra, Appendix No. II;

81. *Example* 4.—The legitimate effect of circumstantial evidence in cases in which the *quantity of interest* given by the will is the point in dispute, is not perhaps so well defined as in the cases which have already been stated. The proposition, however, that such evidence is admissible, where the quantity of interest is the point in dispute, is certain.

82. The arguments of the Court in *Pocock* v. *The Bishop of Lincoln*,[d] fully recognize the particular point now insisted on. The circumstances of that case were not such as necessarily to exclude the supposition that the words, "perpetual advowson," upon which the question in that case turned, were used by the testator in their strict and primary sense; and the Court there- [68] fore properly refused to admit any other interpretation of the testator's words. But if, in that case, no state of circumstances could have been suggested, in which the devisee could possibly have been benefited by the devise, without departing from the strict and primary sense of the testator's words, the Court must, in favour of the testator's intention, have accommodated their meaning to the circumstances of the case, by analogy to the cases referred to under the first and second examples, and upon the same principle.

83. In the recent case of *Lowe* v. *Lord Huntingtower*,[e] a bill was filed for the specific performance of

Abbot v. *Massie*, 3 Ves. 148; *Price* v. *Page*, 4 Ves. 680; *Doe* d. *Smith* v. *Lord Jersey*, 2 Brod. & Bing. 553; S. C. infra, pl. 95, n.; *Colpoys* v. *Colpoys*, Jac. 451; *Goblet* v. *Beechey*, Appendix, No. 1.

[d] 3 Brod. & Bing. 27; and supra, page 25.

[e] 4 Russ. 532, n.

an agreement to purchase certain lands. The cause was heard before his Honour the Vice-Chancellor, on the 30th day of June, 1818, when the Court ordered that a case should be made for the opinion of the Judges of the Court of King's Bench; and it was ordered, that the question should be:—Whether the plaintiff was seised of an indefeasible estate in fee-simple, or of any and what other estate in the undivided moiety of the lands and hereditaments in question?

84. The case was argued in Trinity Term, 1823,
[69] and the Judges certified their opinion to be,—that the plaintiff was seised of an indefeasible estate in fee-simple in the undivided moiety of the lands in question.[f]

85. A motion was afterwards made before his Honour the Vice-Chancellor, that the case upon which the Judges had given their opinion, as aforesaid, should be amended,—by stating therein *certain facts collateral to the will under which the estate was devised;* and that the case *so amended* should be sent back to the Judges for their opinion. The motion was supported upon a suggestion, that, if the facts sought to be introduced by amendment had been under the view of the Court, when the above-mentioned certificate was given, a different construction would have been put upon the will.[g]

86. His Honour refused the motion.

87. The motion was afterwards made before the Lord Chancellor (Lord Eldon), when his Lordship

[f] *Lowe* v. *Manners*, 5 Barn. & Ald. 917. [g] *Ex relatione.*

made the following order:—" His Lordship doth order that the case whereupon the Judges of the Court of King's Bench have certified their opinion be amended, *by introducing therein a statement of the facts*, that, at the date of the will, the plaintiff, in the said bill and the said case named by the name of Drury, was a [70] bachelor; that the testator's daughter, Anne Lowe, had attained the age of fourteen years; and Edward Miller Mundy had five sons; namely, Edward Miller Mundy, the younger, aged seven years; Godfrey Basil Meynal, six; George, four; Frederick, three; and Henry, two years, or thereabouts; and that, at the date of the codicil, the said plaintiff was a married man, and all the said sons of the said Edward Miller Mundy, the elder, were living, and bachelors; and that, at the time when the said testator's daughter, Anne Lowe, attained the age of twenty-one years, the said plaintiff was a married man; and, by inserting therein the following extract from the will of Lowe, the testator in the case named, (that is to say) 'Whereas, at this time I cannot ascertain or put a proper estimate upon my personal estate, and varieties of securities due to me, owing to the abuse of wicked and designing men; and consequently the getting in debts and securities due to me is precarious, and may fall short of what is justly due to me, at the same time can have no doubt that it must be considerably more than my debts and legacies can amount to—I will and desire my aforesaid executors will exert themselves in early applications, as from too much experience I have found

[71] that delays are dangerous, and no confidence is to be put in specious appearances and promises; and that, as soon as my debts and legacies, as aforesaid, are discharged, I will that, as soon as they shall have the sum of £500 in their hands, it shall be laid out in good security till it arrives to the sum of £5000, and then laid out in land as near the parish of Danby as they meet with a purchase; and the next £5000 to be laid out in land in the parish of Spoondon and Chaddesden, and as contiguous to Locko as a purchase may offer, and so alternately as it may arise.'—And it is ordered, that the said case, when so amended, be referred back to the Judges for their opinion,—*Whether the facts so introduced are admissible as evidence in the said case;* and if so, whether, on the case so amended as aforesaid, they are of the same opinion as before certified by them, or how otherwise? And his Lordship doth reserve the consideration of all further directions, until after the Judges shall have made their certificate; and any of the parties are to be at liberty to apply to the Court as they shall be advised."[h]

88. The amended case was argued before the Judges [72] of the Court of King's Bench on the 18th and 21st days of May, 1824, and the following certificate was returned by them:—"This case has been argued before us by counsel; we have considered it, and are of opinion, *that the facts ordered to be introduced into the case are admissible in evidence;* and, on the

[h] Reg. Lib. B. 1821, fol. 2041.

case so amended, we are of the opinion before certified.

C. ABBOTT.
J. BAYLEY.
G. S. HOLROYD.
T. LITTLEDALE."

89. On the 10th day of December, 1825, the cause came on upon the equity reserved, and a specific performance of the contract was decreed.

90. This case, which has been recognized in the recent case of *Miller* v. *Travers*,[i] proves in the clearest manner the right of a Court of law, where *the estate or quantity of interest* disposed of by a testator is in dispute, to look out of the will and be guided in the construction of it by the effect (if any) which the circumstances of the case may have upon it.

91. In *Gall* v. *Esdaile*,[k] which came before the Court upon a special case, the devise was as follows: [73] "As to the rest of my estate, my two houses in S. and T. I give to my wife for life, and, after her decease, that in S. to my daughter, the other between my two sons. The rest of my estate, of what kind soever, one third to my wife, and the rest equally among the three children." *The testator had no real property but the two houses.* The question was, whether the daughter took an estate for life, or an estate in fee, in those houses. Tindal, C. J., said: "It aids this construction (giving the daughter a fee) that the testator had no

[i] 8 Bing. 244.
[k] 8 Bing. 323 [and see 1 Russ. & Myl. 540].

other real property;" and Alderson, J., said: "I should have had some difficulty if the case had not stated that the testator had no other real property; but when that is stated, and the residuary clause may apply to personal property, the devise to the testator's wife and daughter, standing unconnected with the residuary clause, is sufficient to give the daughter a fee." [5]

92. Another case in point is the construction of a devise to A. and his *heirs*, and if he shall die without *heirs*, then to B., where B. is capable of being collateral heir to A. In that case, the word *heirs* will be construed *heirs of the body*.[l] So, the effect of a devise to
[74] A., after the death of B., according to a well-known rule of law, will vary according to the relation in which A. and the testator stand to each other. If A. be heir-at-law to the testator, B. will take a life estate in the land devised. If A. be not heir-at-law to the testator, B. will take nothing.[m]

93. The cases referred to in a former page[n] in which the words *in default of issue* or on *failure of issue* have been construed to mean issue *living at the death of the testator*, illustrate the same point, although (as before observed) an important principle appears to be sacrificed by the decisions which have been come to in those cases.

94. *Example* 5.—It is upon the principle before

[5] [See *Vick* v. *Sueter*, 3 Ell. & Bl. 219.]

[l] Fearne, 466; Id. 7.

[m] *Horton* v. *Horton*, Cro. Jac. 74. [1 *Jarm. Wills*, 2nd ed. 445.]

[n] Supra, pl. 50.

adverted to, namely that all writings tacitly refer to the existing circumstances under which they are made, that Courts of law admit evidence of particular customs and usages in aid of the interpretation of written instruments—whether ancient or modern—whenever, from the nature of the case, a knowledge of such customs and usages is necessary to a right understanding of the instrument.[o] The law is not so unreasonable as to deny to the reader of any instrument the same light which the writer enjoyed. [75]

95. Examples illustrating the Fifth Proposition above stated might be multiplied without end.[p]

[o] 1 Phil. on Ev. 558, 7th ed. [Vol. 2, ch. 7, sec. iii. 9th ed.]

[p] In support of the general proposition, that Courts of law will look at extrinsic circumstances in aid of the construction of a written instrument, see per Lord Hardwicke in *Goodinge* v. *Goodinge*, 1 Ves. sen. 231; per Lord Thurlow, in *Jeacock* v. *Falkener*, 1 Bro. C. C. 295; in *Green* v. *Howard*, 1 Bro. C. C. 32; and in *Fonnereau* v. *Poyntz*, 1 Bro. C. C. 472; per Lord Loughborough, in *Mackell* v. *Winter*, 3 Ves. J. 540, 541; per Lawrence, J., in *Leigh* v. *Leigh*, 15 Ves. 92; per Lord Manners, C., in *Crone* v. *Odell*, 1 Ball & Bea. 480; per Sir T. Plumer, in *Beachcroft* v. *Beachcroft*, 1 Madd. 430; and in *Colpoys* v. *Colpoys*, Jac. 451; per Lord Eldon, in *Oakden* v. *Clifden*, Linc. Inn Hall, 1826, MS.; [per Sir L. Shadwell, in *Blundell* v. *Gladstone*, 11 Sim. 486.] See also *Lane* v. *Lord Stanhope*, 6 T. R. 345; *Doe* d. *Le Chevalier* v. *Huthwaite*, 3 Barn. & Ald. 632; *Doe* d. *Gibson* v. *Gell*, 2 B. & C. 680; *Pocock* v. *Bishop of Lincoln*, 3 Brod. & Bing. 27; *Alford* v. *Green*, 5 Madd. 95; *Goodwright* v. *Downshire*, 2 Bos. & Pul. 608, 1 New Rep. 344; *Wilde's case*, 6 Rep. 16; *Lansdowne* v. *Lansdowne*, 2 Bligh, 60; and see the arguments of counsel in the recent case of *Pycroft* v. *Gregory*, 4 Russ. 526; *Clementson* v. *Gandy*, 1 Keen, 309; *King* v. *Badely*, 3 Myl. & K. 417; *Gord* v. *Needs*, 2 Mees. & Welsby, 149, infra, pl. 182; *Hiscocks* v. *Hiscocks*, 5 Mees. & Welsby, 363, infra, pl. 183; [*Reynolds* v. *Whelan*, infra, Prop. VII.] The same principle

[76] 96. They appear to justify the conclusion, that "Every claimant under a will has a right to require that a Court of construction, in the execution of its office, shall—by means of extrinsic evidence—place itself in the situation of the testator, the meaning of whose language it is called upon to declare."[q] It [77] follows that,—*if with the light which that situation alone affords, the testator's meaning can be determined by a Court, the Court which so determines does, in effect, declare that the testator has expressed his intention with certainty*, or, in other words, that his *will is free from*

of construction applies to deeds. There cannot, indeed, be any difference in this respect between deeds or other writings and wills. Deeds require particular words in particular cases to express a given purpose; but when that requisition is complied with, the rules of construction must be the same, for the intention is the object sought for in all alike. See *Wright* v. *Kemp*, 3 T. R. 470. Accordingly, in *Doe* d. *Jersey* v. *Smith*, 2 Brod. & Bing. 553, Bayley, J., says: "The evidence here is not to produce a construction against the direct and natural meaning of the words; not to control a provision which was distinct and accurately described; but, because there is an ambiguity *upon the face of the instrument;* because an indefinite expression is used, capable of being satisfied in more ways than one; and I look to the state of the property at the time, to the estate and interest the settlor had, and the situation in which she stood with regard to the property she was settling, to see whether that estate or interest or situation would assist us in judging what was her meaning by that indefinite expression."

See also *Sir John Eden* v. *The Earl of Bute*, 3 Bro. P. C. 679; *Countess of Shelbourne* v. *Inchiquin*, 1 Bro. C. C. 348; *King* v. *The Inhabitants of Laindon*, 8 T. R. 379; and per Ashurst, J., in *Doe* v. *Burt*, 1 Term R. 703; Sug. Vendors, p. 142, 6th ed.; *Simons* v. *Johnson*, 3 B. & Adol. 175; *Smith* v. *Wilson*, 3 B. & Adol. 728; *Ponton* v. *Dunn*, 1 Russ. & Myl. 403. Cases, supra, pl. 58, n.

[q] In the recent case of *Doe* d. *Templeman* v. *Martin*, as reported in 1 Nev. & Manning, p. 524, Parke, J., said: "I think facts and

ambiguity.[r] There is no other criterion of *legal certainty* in a will.

97. The case of *Doe* d. *Oxenden* v. *Chichester* (*supra*, p. 25) may at first sight appear at variance with the generality of the conclusion stated above; but, in reality, it is not so. It was decided, in that case, that the words of the will were sensible as they stood, *with reference to extrinsic circumstances*, and the evidence was tendered for the express and admitted purpose of [78] proving, that the testator meant something different from what his words *strictly interpreted* expressed. This, according to the Second Proposition stated above, could not be done.

98. In limiting the evidence spoken of in the Fifth Proposition to *material* facts, the generality of the

circumstances relating to the subject of the devise are admissible; such as possession by the testator, the mode of acquiring local situation, and the general state of the testator's property. The Court may take such things into consideration, *so as to put themselves in the place of the testator, and then see how the terms of the will affect the property*." And in *Guy* v. *Sharp*, 1 Myl. & K. 602, July, 1833, the Lord Chancellor said, "I may, however, observe generally, on the reception of extrinsic evidence, with a view to aid the construction and give explanation, not to alter or to control the sense—*a purpose for which it can never be received*—that there is a manifest difference between the *declarations*, whether verbal or written, of a testator, and the proof of *facts and circumstances*, by the knowledge of which the Court, when called upon to construe, may be *placed in the same situation with the party who made the instrument, and may thereby be the better able to understand his meaning*." [*Thompson* v. *Hempenstall*, 13 Jur. 815; *Doe* d. *Thomas* v. *Beynon*, 12 Ad. & Ell. 431.]

[r] Infra, pl. 198–204.

Proposition contended for, respecting the admissibility of *explanatory evidence*[8] in aid of the exposition of wills, is in no degree broken in upon. This limit is imposed by the general laws of evidence, and not by anything peculiar to the subject to which it is here applied. The only question to which this particular subject gives rise, is this:—By what tests is the materiality of a given fact to be tried? The answer to this question must be taken from the general laws of evidence, and will be found to present itself in a clear and practical form.

99. Thus, the Second Proposition (p. 18) asserts, that where the words of a will, strictly construed, *are sensible with reference to extrinsic circumstances*, their
[79] strict and primary meaning, and no other, shall prevail. It will follow that any fact, which, *according to the ordinary rules of evidence*, would prove or tend to prove that the *circumstances of a case* were such as to admit of the testator's words being strictly construed, or that they were not capable of a strict construction, would be a *material* fact, within the meaning of the Fifth Proposition.

100. Again, the Third Proposition (p. 56) asserts, that where the words of a will, strictly interpreted, are *insensible with reference to extrinsic circumstances*, a secondary sense of the words may be put upon them provided the *circumstances of the case* be such as to satisfy a Court that the testator (who must have had some meaning) intended that which is ascribed to him.

[8] Prop. V.

From this, it will follow, that any fact will be material, in cases falling under the Third Proposition, which, *according to the ordinary rules of evidence*, proves or tends to prove that the *circumstances of the case* are such as to admit of or require the secondary interpretation of the words which may be contended for, and evidence of an opposite tendency must, upon general principles, be admissible also.

101. The Fourth Proposition requires no comment in this place.

102. It is obvious, from the preceding observations, that the *purpose* for which extrinsic evidence may be [80] adduced in a suit to execute or avoid a will, may undergo *successive* changes; for the first question will be, whether the words are sensible as they stand; and, if that question be answered in the negative, a second will arise, namely, whether their meaning is clear in any other sense. It is obvious, therefore, that the question of materiality must shift with *the succession of purposes* for which the evidence may be adduced.

103. In practice, an opportunity will generally offer of objecting to the admission of evidence, the materiality of which is questionable, as in *Doe* d. *Oxenden* v. *Chichester*,[t] and *Mounsey* v. *Blamire*;[u] and upon the discussion to which the objection will give rise, the materiality of the evidence will be considered and determined, and the evidence will be admitted or rejected according to the determination. Where no such opportunity offers, it seems, from the case of *Lowe* v.

[t] Supra, pl. 34, 97.

[u] Supra, pl. 86.

Lord Huntingtower,[x] and *Doe* d. *Templeman* v. *Martin*,[y] that the Courts will, *in the first instance*, admit evidence of any facts, which, from their nature, may bear upon and influence the construction of the will, [81] although no effect may, in the event, be given to such evidence. If, however, the facts tendered be such that they cannot, from their nature, be material, the Court will at once reject them.[6] Therefore, evidence of the amount of a testator's personal estate, at the time of making his will, though a mere fact unconnected with the question of the testator's intention, is, in general, inadmissible. The reason is obvious. The will, *quoad* the personal estate, speaks from the death of the testator, and consequently its amount at the time of making the will, although it might bias the judgment, could not, in general, form a just ground of inference as to the meaning of the testator's words. Such evidence, however, may, under special circumstances, be material, and then it will be admissible.[z]

104. Where the inquiry is, what the words of a will express, as distinguished from what the testator meant by the words, evidence of *declarations of intention*, of *instructions* given by the testator for preparing his will,[7] or any evidence of a similar nature, is obviously inapplicable to the point of inquiry. Such

[x] Supra, pl. 83. [y] 4 B. & Adol. 771; supra, pl. 96, note.

[6] [See per Sir James Wigram, in *Sayer* v. *Sayer*, supra, page 33 note.]

[z] *Barksdale* v. *Gilliat*, 1 Swanst. 562; *Fonnereau* v. *Poyntz*, 1 Bro. C. C. 471; S. C. cited 6 Ves. 401; *Colpoys* v. *Colpoys*, Jac. 451.

[7] [*Bernasconi* v. *Atkinson*, 10 Hare, 345.]

evidence, therefore, is, for the purpose of such an in- [82]
quiry, inadmissible.[b] Declarations by the testator, on a point collateral to the question of intention, may however be evidence of an *independent fact*, material to the right interpretation of the testator's words. Such evidence will, then, upon the general principle,[c] be admissible.[d] No fact (it may be observed), as a general proposition, can be material, which is not coincident in point of time with the making of the will.[e]

[b] See cases collected, infra, pl. 121, notes, and pl. 124.

[c] Supra, Prop. V.

[d] *Herbert* v. *Reid*, 16 Ves. 484; *Goodtitle* v. *Southern*, 1 M. & Selw. 299; *Benson* v. *Wittam*, 2 Sim. 493; *Powys* v. *Mansfield*, 3 Myl. & Cr. 359. [*Blundell* v. *Gladstone*, 11 Sim. 467.]

[e] 5 B. & C. 69, in *Doe* d. *Winter* v. *Perratt*.

[88] ## PROPOSITION VI.

Where the words of a will, aided by evidence of the material facts of the case, are insufficient to determine the testator's meaning, no evidence will be admissible to prove what the testator intended, and the will (except in certain special cases, see Prop. VII.) *will be void for uncertainty.*[f]

105. The observations already made, (if well founded), establish the right of every claimant under a will to bring under the view of the Court which is to expound it every material fact to which the will expressly or tacitly refers; they establish, that Courts

[f] Of certainty in a will, see infra, pl. 126. ["We ought not, without absolute necessity, to let ourselves embrace the alternative of holding a devise void for uncertainty. Where it is possible to give a meaning we should give it, that the will of the testator may be operative; and where two or more meanings are presented for consideration, we must be well assured that there is no sort of argument in favour of one view rather than another, before we reject the whole. It is true, the heir-at-law shall only be disinherited by clear intention; but if there be ever so little reason in favour of one construction of a devise rather than any other, we are at least sure that this is nearer the intention of the testator, than that the whole should be void and the heir let in. The cases where Courts have refused to give a devise any effect on the ground of uncertainty, are those where it was quite impossible to say what was intended, or where no intention at all had been expressed, rather than cases where several meanings were suggested and seemed equally entitled

of law recognize that natural dependence which exists between language and the circumstances with reference to which it is used, and which makes a knowledge of such circumstances necessary to a right interpretation of the language; and consequently, that a reference to such circumstances, in expounding a will, is strictly consistent with the office simply of determining the [84] meaning of the testator's words.

106. Now, suppose the language of the will, notwithstanding the light thrown upon it by evidence of the facts to which it has reference, to be so equivocal or obscure as to leave the testator's intention in uncertainty. This uncertainty may present itself under different forms—either the language of the will may be capable of more than one meaning, or it may be incapable of any certain meaning. Shall the will, in either of such cases, be void for uncertainty—or shall the claimant be at liberty to prove, by parol evidence,

[to the preference. On this head it may further be observed, that the difficulty of arriving at a conclusion—even the grave doubt which may hang round it—certainly the diversity and the conflict of opinions respecting it, and the circumstances of different persons having attached different meanings to the same words, form no ground whatever of holding a devise void for uncertainty. The difficulty must be so great, that it amounts to an impossibility; the doubt so great, that there is not an inclination of the scales one way, before we are entitled to adopt the conclusion. Nor have we any right to regard the discrepancy of opinions as any evidence of the uncertainty, while there remains any reasonable ground of preferring one solution to all the rest. The books are full of cases, where every shift, if I may so speak, has been resorted to, rather than hold the gift void for uncertainty." Per Lord Brougham, 6 Mann. & Gr. 359. See also *Mason* v. *Robinson*, 2 Sim. & St. 295; *Adams* v. *Jones*, 9 Hare, 485.]

what the testator (who must be presumed to have had some meaning) *intended to have expressed?*

107. This question (regard being had to the stage of the investigation in which it is proposed) supposes every legitimate process, by which the intention ascribed to the testator could be extracted from his words, to have been ineffectually exhausted. The question, therefore, in its extreme form, is,—whether the Courts can admit evidence which, *passing by the written will*, makes the *intention* of the testator, *as an independent fact*, the direct and immediate subject of proof; in other words,—whether a nuncupative will may be added to a written will? The rule of the [85] common law before adverted to, and the letter of the statute, both require that the answer to this question should be in the negative.

108. The general proposition, that a written instrument cannot be contradicted, varied, or added to by parol evidence, has never been disputed; but some Judges appear to have entertained an opinion, that if the words of a will were susceptible of different interpretations, a Court might inform itself *aliunde* of the *intention* of the party who used them, for the purpose of applying the words of equivocal import in the sense which that intention required.

109. Thus—Lord Chancellor Cowper, in *Strode* v. *Russell*, upon the authority of *Cheyney's case*,[g] to which he referred, was of opinion[h] that, where the words of

[g] 5 Rep. 68.

[h] *Strode* v. *Russell*, 8 Vin. Abr. 194, pl. 23; S. C. 2 Vern. 620.

the will stood *in equilibrio*, and were so doubtful that they might be taken one way or another, it was proper that evidence[i] *in all cases* should be read to explain them; and this appears to have been frequently done by the same learned judge.[k] And in *Hampshire* v. *Pierce*,[l] Sir John Strange, M.R., is reported to have [86] said,—"The distinction as to admitting parol evidence I have always taken to be, that in no instance shall it be admitted in contradiction to the words of the will; but if the words of the will are doubtful and ambiguous, and unless some reasonable light be let in to determine them, the will must fall to the ground; *anything*[m] to explain, not to contradict, the will, is always admitted." However, Tracey, J., who assisted Lord Cowper in deciding the case of *Strode* v. *Russell*, dissented from him in respect of admitting the evidence.[n] Lord Hardwicke has recorded his disapprobation of Lord Cowper's rule;[o] and Lord Cowper himself qualified the opinion he expressed, by saying,—"We will consider how far it be allowed, and how far not, after it is read; and this is not the case of evidence to a jury, who are easily biassed by it, which this Court is not."[p] The case of *Hampshire* v. *Pierce* did not require a judicial opinion so broad as that attributed

[i] "Declarations of the testator." 2 Vern. 623.

[k] Per Lord Hardwicke, C., 2 Atk. 374.

[l] 2 Ves. sen. 216. See observations upon this case in *Hiscocks* v. *Hiscocks*, infra, pl. 183.

[m] "Declaration of the testatrix." 2 Ves. sen. 218.

[n] 2 Vern. 624; 2 Atk. 374.

[o] In *Ulrick* v. *Litchfield*, 2 Atk. 374.

[p] 8 Vin. Abr. 194, pl. 23.

to the Master of the Rolls, and his attention was not called to the distinctions pointed out in this work. In
[87] the recent case of *Richardson* v. *Watson*,[q] as reported in B. & Adol., Parke, J., is reported to have said,—"Evidence might be given to *show that the testator used* the word *close* in the sense which it bore in the country where the property was situate, as denoting a *farm*." In the report of the same case, in 1 Nev. & Manning, 575, the same part of the judgment is thus given: "Evidence as to the meaning of the word *close* in the will would have been admissible." The latter, it is conceived, must be the correct reading of the passage; for, from the tenor of the judgment in that case, it is clear that evidence could not have been held admissible to prove in what sense the testator used the word *close*, except so far as such proof was a consequence of the fact that *close* and *farm* meant the same thing.

120. The remaining cases applicable to the Sixth Proposition are numerous and decisive, and appear to conclude the question now under consideration, and to decide in conformity with principle,[r] that, if a testator's words, aided by the light derived from the circumstances with reference to which they were used,
[88] do not express the intention ascribed to him, evidence to prove the sense in which he intended to use them, is as a general proposition,[s] inadmissible,—in other words, that the judgment of a Court in expounding

[q] 4 B. & Adol. 787. [r] Supra, pl. 9, 10.
[s] See the exception, infra, pl. 130, et seq.

a will must be simply *declaratory* of what is *in* the will.

121. Thus it has been laid down (either in *dictum* or decision), that evidence is inadmissible for the purpose,—1, of filling up a total blank in a will;[t] or 2, of inserting a devise omitted by mistake;[u] or 3, of proving what was intended by an unintelligible word;[x] or 4, of proving that a thing *in substance*, different from that described in the will, was intended;[y] or 5, of changing the person described;[z] or 6, of reconciling conflicting clauses in a will;[a] or 7, of proving to which of two antecedents a given relative was intended to refer;[b] or 8, of explaining or altering the estate;[c] or [89] 9, of proving which of several testamentary guardians was intended to have the actual care of children;[d] or

[t] *Baylis* v. *Attorney-General*, 2 Atk. 239; *Castledon* v. *Turner*, 3 Atk. 257; *Hunt* v. *Hort*, 3 Bro. C. C. 311. [*Taylor* v. *Richardson*, 2 Drew, 16.]

[u] *Lady Newburgh's case*, 5 Madd. 364; *Anon.* 8 Vin. Abr. 188, G. a, pl. 1.

[x] *Goblet* v. *Beechey*, App., infra, No. 1., and 3 Sim. 24.

[y] Per M. R. in *Selwood* v. *Mildmay*, 3 Ves. jun. 306.

[z] *Delmare* v. *Robello*, 1 Ves. jun. 412; and see per M. R. in *Beaumont* v. *Fell*, 2 P. Wms. 140.

[a] Per Lord Hardwicke, C., in *Ulrich* v. *Litchfield*, 2 Atk. 372.

[b] *Lord Walpole* v. *Lord Cholmondeley*, 7 Term R. 138; *Castledon* v. *Turner*, 3 Atk. 256.

[c] *Cheyney's case*, 5 Rep. 68.

[d] *Storke* v. *Storke*, 3 P. Wms. 51; 2 Eq. Abr. 418, pl. 13; *contra*, *Anon.* 2 Ves. sen. 56. The admissibility of evidence in this case may be satisfactorily explained; for, if guardians disagree, the Court has jurisdiction independently of the will, and then the evidence may be resorted to as a guide for the independent judgment of the Court.

10, of proving what was to be done with the interest of a legacy till the time of payment;[e] or 11, of proving that, by a bequest of residue, a particular sum was intended;[f] or 12, of construing the will with reference to the instructions given for preparing it;[g] or 13, of proving that an executor was intended to be a trustee of residue for next of kin;[h] or 14, of proving that an executor was intended to take beneficially, where, upon the face of the will, it was conclusively apparent that
[90] he was intended to be a trustee;[i] or 15, of controlling a technical rule of verbal construction;[j] or 16, of explaining the sense in which the word "relations," was intended to be used;[k] or 17, what a testator intended to give by the word "plate;"[l] or 18, what a testator intended to devise by the words "lands out of settlement;"[m] or 19, of proving that a portion was intended to be a satisfaction of a bequest of residue;[n] or 20, that a legacy in a codicil was intended to be a substi-

[e] *Mansel* v. *Price*, Sugd. Vend. 138, 6th ed.

[f] *Brown* v. *Langley*, 2 Eq. Abr. 416, pl. 14, and 8 Vin. Abr. 197, pl. 36. See *Dyose* v. *Dyose*, 1 P. Wms. 305, disapproved by Lord Thurlow in *Fonnereau* v. *Poyntz*, 1 Bro. C. C. 472, and by Sir W. Grant, M. R., in *Page* v. *Leapingwell*, 18 Ves. 466; and see 1 P. Wms. 306, n.

[g] *Goodinge* v. *Goodinge*, 1 Ves. sen. 230; *Murray* v. *Jones*, 2 Ves. & B. 318. [*Bernasconi* v. *Atkinson*, 10 Hare, 348.]

[h] *Bishop of Cloyne* v. *Young*, 2 Ves. sen. 95; *White* v. *Williams*, Coop. 58; *Langham* v. *Sandford*, 2 Mer. 17. [i] S. C.

[j] Per Lord Kenyon, C. J., and Lawrence, J., 6 T. R. 252, 354.

[k] *Goodinge* v. *Goodinge*, 1 Ves. sen. 230; *Edge* v. *Salisbury*, Amb. 70; *Green* v. *Howard*, 1 Bro. C. C. 31.

[l] *Nicholls* v. *Osborn*, 2 P. Wms. 419; *Kelly* v. *Powlet*, Amb. 605.

[m] *Strode* v. *Russell*, 2 Vern. 621.

[n] *Freemantle* v *Bankes*, 5 Ves. 85.

tution for a legacy in the will;[o] or 21, of proving that a devise to a wife was intended to be in bar of dower;[p] or 22, of supplying a use or trust;[q] or 23, of ascertaining whether the real estate was charged with the payment of debts in aid only, or in exoneration of the personal estate;[r] or 24, of proving that the intention, [91] in appointing a debtor to be executor, was to release the debt;[s] or 25, of rebutting a presumption which arises from the construction of words simply *quà* words;[t] or 26, of raising a presumption;[u] or 27, of increasing a legacy;[x] or 28, of increasing that which is defective;[y] or 29, of adding a legacy to a will;[z] or 30, of proving what interest a legatee was intended to take in a legacy;[a] or 31, of ascertaining an intention which upon the face of the will was indeterminate, as in the case of a devise to one of the sons of A., who hath several sons;[b] or 32, of proving that words of limitation were intended to be construed as words of purchase;[c] or 33, of proving that executors

[o] *Hurst* v. *Beach*, 5 Madd. 351.

[p] *Leake* v. *Randall*, 1 Vin. Abr. 188, G. a., pl. 3. [q] Id., pl. 4.

[r] *Bootle* v. *Blundell*, 1 Mer. 193.

[s] *Brown* v. *Selwin*, Cases temp. Talbot, 240; S. C. on appeal, 3 Bro. P. C. 607.

Per Lord Thurlow, 2 Bro. C. C. 527.

[u] *Rachfield* v. *Careless*, 2 P. Wms. 157.

[x] Per Lord Hardwicke, in *Goodinge* v. *Goodinge*, 1 Ves. sen. 231.

[y] *Anon.* 8 Vin. Abr. 188, G. a., pl. 1.

[z] *Whitton* v. *Russell*, 1 Atk. 448.

[a] *Lowfield* v. *Stoneham*, 2 Strange, 1261.

[b] 2 Vern. 625; and see *Altham's case*, 8 Rep. 155.

[c] *Bret* v. *Rigden*, Plow. 340; and see *Doe* v. *Kett*, 4 Term R. 601; *Maybank* v. *Brooks*, 1 Bro. C. C. 84.

[92] who had acted in part, and then renounced, were intended by the testator to act only to the extent to which they had acted;[d] or 34, of proving that the testator meant to use general words in this or that particular sense;[e] or 35, of adding to, detracting from, or altering, the will;[f] or 36 (generally), of proving *intention*.[g]

[93] 122. To the above may be added the recent case of *Doe* d. *Richardson* v. *Watson*,[h] and the still more recent cases of *Clementson* v. *Gandy*, *King* v. *Badeley*, and *Preedy* v. *Holtom*. In *Clementson* v. *Gandy*, evidence was tendered to show, that the testatrix had

[d] *Doyle* v. *Blake*, 2 Sch. & Lefr. 240.

[e] *Goodinge* v. *Goodinge*, 1 Ves. sen. 231.

[f] *Herbert* v. *Reid*, 16 Ves. 481.

[g] Per Buller, J., in *Nourse* v. *Finch*, 1 Ves. jun. 358; per Sir Wm. Grant, M.R., in *Cambridge* v. *Rous*, 8 Ves. 22, and in *Bengough* v. *Walker*, 15 Ves. 514; per Lord Eldon, in *Herbert* v. *Reid*, 16 Ves. 485–6, and 489; *Attorney-General* v. *Grote*, 3 Mer. 316, *Maybank* v. *Brooks*, 1 Bro. C. C. 84 (*Legatee dead*); *Doe* v. *Kett*, 4 T. R. 601 (*Devisee dead*); *Lord Lansdowne's case*, 10 Mod. 98–9; *Cole* v. *Rawlinson*, 1 Salk. 234; *Bertie* v. *Lord Falkland*, 1 Salk. 231 (*Instructions for the Will*); *Lowfield* v. *Stoneham*, 2 Strange, 1261; *Chamberlayne* v. *Chamberlayne*, 2 Freem. 52; *Towers* v. *Moor*, 2 Vern. 98; *Vernon's case*, 4 Rep. 4; *Cheyney's case*, 5 Rep. 68; *Brett* v. *Rigden*, Plow. 340; Bac. Elem. Reg. 23; 2 Bac. Abr. 309; *Challoner* v. *Bowyer*, 2 Leon. 70; and the following treatises, —Sugd. Vend. tit. "Ambiguity;" Phil. on Evid.; and Roberts on Wills. *Contra*,—*Harris* v. *Bishop of Lincoln*, 2 P. Wms. 135; *Pendleton* v. *Grant*, 2 Vern. 517; S. C. 1 Eq. Abr. 230; *Dayrel* v. *Molesworth*, 1 Eq. Abr. 230; *Docksey* v. *Docksey*, 2 Eq. Abr. 415; but see S. C. 11 Vin. Abr. 153; *Masters* v. *Masters*, 1 P. Wms. 420 (*N.B.* a *Charity* case); and see per Lord Chancellor Brougham, in *Guy* v. *Sharp*, 1 Myl & K. 602, supra, pl. 96, note. [*Kirk* v. *Eddowes*, 3 Hare, 509.]

[h] 4 B. & Adol. 787.

made her will upon a miscomputation of the amount of her property.[i] The Master of the Rolls said,—"In cases which require it, the Court may look at external circumstances, and, consequently, receive evidence of such circumstances for the purpose of ascertaining the meaning of the terms used by the testator. But parol evidence is not to be resorted to, except for the purpose of proving facts which make intelligible something in the will, which, without the aid of extrinsic evidence, cannot be understood. Here the intention to dispose is clearly expressed by the testatrix; there is no ambiguity in the expression she has employed; and extrinsic evidence for the purpose of contradicting the intention is inadmissible." In *King* v. *Badeley*,[k] a testator having devised his estates in a particular way, directed, that a different disposition of them should [94] take place, "in case certain contingent property and effects in expectancy should fall in and become vested interests to my children," etc. The children being entitled to no contingent interests at the date of the will, the Court refused to admit evidence for the purpose of showing, that the testator referred to expectations from particular incidents which had afterwards been realized. The Master of the Rolls said,—"If at the making of the testator's will, his children had been

[i] 1 Keen, 309. [The precise object of the evidence was to show that the testatrix intended to pass under a general bequest certain property in which she had only a life interest, supposing it to be her own absolutely, so as to put a legatee, who had an interest in the property, to his election.]

[k] 3 Myl. & K. 417.

entitled to any contingent interests, evidence would have been plainly admissible to ascertain those interests, because the expression of contingency has a definite legal meaning, and *id certum est quod certum reddi potest;* and the evidence would have explained, but would not have added to the will. To admit evidence to show that the testator referred to expectations from Mr. Ewer, would not be to explain the expressions of his will, but to add to his will that which he has not expressed. The evidence offered must, therefore, be rejected." In *Preedy* v. *Holtom*,[1] the testator devised to A. the messuage in S., in which the testator resided, with the buildings to the same adjoining, and [95] all those several closes in S. aforesaid, called C., D., and E. (with the brick-kiln erected thereon), and F., with their appurtenances, part of the farm and lands then in testator's own occupation. The will then contained a devise to B. of a second messuage, and all other the testator's lands. Under this will B. claimed two cottages in S., which, when the will was made, adjoined the messuage in which the testator resided, but were not in his occupation, and were divided from the messuage by a wall built by the testator. For the purpose of showing that the cottages claimed by B. were intended to pass under the residuary clause, evidence of declarations, made by the testator when giving instructions for his will, was tendered. The Court clearly held, that evidence was admissible, only to show what the state of the testator's property was, but not

[1] 4 Adol. & Ellis, 76.

"for the purpose of construing the expressions of the will, and giving them a more extended meaning than the words themselves bear."

123. It may, therefore, it is conceived, notwithstanding the opinions expressed by Lord Cowper and Sir John Strange, be considered as settled, that the rule of law which excludes extrinsic evidence to prove *intention* is not subject to any such exception as their [96] opinions appear to point at.[m]

124. It will be seen, on examining the reports of the cases referred to in support of the Sixth Proposition, that, in many of them, the evidence tendered consisted of *declarations* by the testator, or of *instructions* given by him for preparing his will. Such evidence is, obviously, inapplicable to an inquiry, in which the question is, not what the *testator* meant to express, but what his *words* do express. In others, of the same class of cases, the precise nature of the evidence tendered does not appear by the reports; but, from the nature of the point in dispute in those cases, it is clear that facts alone could not, by any explanatory effect upon the words of the will, have shown that the will itself expressed the intention ascribed to the testator. The purpose, therefore, for which the evidence in those cases was tendered, must have been that of proving an intention which the will itself did not express; and the cases, in conformity with principle, are decisive, that, for such a purpose, extrinsic evidence, as a general proposition, is inadmissible.

[m] See observations infra, pl. 150, et seq.

[97] 125. The cases most strongly illustrative of the rule by which *averment of intention* is excluded, are those in which the language of the will, although it might, in point of strict legal construction, require one interpretation, was capable, in the ordinary use of language, of the secondary interpretation which it was the object of the evidence to give it. Yet, it appears that, even in such cases, *evidence to prove intention*, as a general proposition, is inadmissible.

126. "*Void for uncertainty.*"—As the effect of the Sixth Proposition is to preclude a Court from ascribing to a testator any intention which his written will does not express, whilst the Third Proposition leaves a wide field of exposition undefined by any positive rules, it may with reason be said, that, in the application of the Third Proposition to the exposition of a will, conjectural interpretation is likely often to usurp the place of judicial exposition; and it may be asked, how, in the application of evidence of collateral facts to the exposition of wills of doubtful meaning, is exposition to be distinguished from conjectural interpretation?

127. The answer to the question, in all its bearings, is by no means easy.

[98] 128. In cases in which the meaning of the words is either settled by decision, or clear upon the will itself, and in which the facts of the case do not necessarily *exclude* the supposition that the words were used in their decided or apparent sense, the Second Propo-

sition above stated leaves nothing to the discretion of a Court; and exposition, in the strict observance of that Proposition, is safe against the inroads of conjecture. In those cases, however, in which (the strict and primary sense of the words being excluded by the circumstances of the case) it is left to the Court to explain them in some secondary or popular sense; or in which it is doubtful whether the words express any certain meaning; the judgment and discrimination of the Court is, of necessity, brought into action, and the difficulty suggested by the question now under consideration presses with considerable force. It is impossible, with reference to such cases, to draw any precise line, by which, in the application of extrinsic evidence to the exposition of a will, exposition is to be distinguished from conjectural interpretation. The test to be applied in each particular case is this,—Do the words of the will, when all the circumstances of the case are known, express the intention which is ascribed to the testator? The Court which interprets the will must be satisfied that they do so, and no other [99] rule can, in the abstract, be laid down.

129. If it be said, that this is raising a question rather than propounding a rule,—the answer to such an observation must be, that the test is as precise as the nature of the subject will admit. The Master of the Rolls, Lord Alvanley, in deciding on a will of doubtful construction, does not appear to have thought that a more precise test could be proposed. "As to the irresistible inference," he says, "I do not know

what is meant by that; I admit it must be such an inference as leaves no doubt upon the mind of the person who is to decide upon it. It must be *irresistible to my mind.*" And in *Attorney-General* v. *Grote*,[n] Lord Eldon said: "Individual belief ought not to govern the case,—it must be judicial persuasion." In the case of *Goblet* v. *Beechey*,[o] the inference that Nollekens meant *models*, by the word "mod" was irresistible to the mind of the Vice-Chancellor. His mind was *judicially persuaded* that such was the sense in which the testator used the word. The mind of
[100] the Lord Chancellor was proof against the same impressions. The case is a fair illustration of the legal meaning of an *irresistible inference*, and a *judicial persuasion*.[p]

[n] Appendix, No. I. [o] Appendix, No. II.

[p] 3 Ves. 113; and see 1 Ves. & B. 466; and 1 Mer. 193, in *Bootle* v. *Blundell*: *Attorney-General* v. *Grote*, infra, Appendix, No. II.

PROPOSITION VII. [101]

Notwithstanding the Rule of Law, which makes a will void for uncertainty, where the words, aided by evidence of the material facts of the case, are insufficient to determine the testator's meaning,—Courts of Law, in certain special cases, admit extrinsic evidence of intention *to make certain the* person *or* thing *intended, where the description in the will is insufficient for the purpose.*

These cases may be thus defined:—where the object of a testator's bounty, or the subject of disposition (i. e. *the* person *or* thing *intended*), *is described in terms which are applicable indifferently to more than one* person *or* thing, *evidence is admissible to prove which of the persons or things so described was intended by the testator.*

130. A class of cases must now be referred to, in which—notwithstanding the preceding class of cases

[1] [The following case affords too happy an illustration of the liberal and practical spirit in which the Courts will *apply* the above Proposition, to be dismissed with a mere reference:—

In *Reynolds* v. *Whelan*, 16 L. J. N. S. Ch. 434, the testator, Augustine Luck, by his will, dated in 1836, made the following bequest:—"I give to William Reynolds, one of my farming men, if in my employ at the time of my decease, the sum of £100."

The testator, who was a farmer, had in his employ at the date of his will, and at the time of his death, two persons of the name of William Reynolds. One of them, the plaintiff, was a common farming servant; and the other, who was called "Old Will," per-

by which proof of intention appears, upon principle, to be excluded—the Courts have permitted the intention of a testator to be made the subject of inquiry by extrinsic evidence alone.

[formed a variety of functions about the person, house, and farm of the testator.

Soon after the testator's death, his executors, considering that Old Will was the person intended by the testator to be legatee, paid him the legacy.

A suit was now instituted by the plaintiff against the surviving executor, for the payment of the legacy of £100 given to William Reynolds.

Some evidence was entered into, for the purpose of showing that the testator intended the legacy for the person called "Old Will." It appeared that Old Will had been in the service of the testator and his father forty years at the date of the will of 1836; that the testator had made a will in 1831, which was in part as follows:—"I give to Richard Ainge, one of my farming men, £100, and to William Reynolds, another of my farming men, £50;" that in 1836, before the date of his second will, he told a witness that he had given "Old Will" £50, and that he should leave him £100.

Sir J. L. Knight Bruce said:—"The question in this case is, whether William Reynolds, the plaintiff, is the person to whom a legacy is given by the will of Augustine Luck in these words, 'To William Reynolds, one of my farming men, if in my employ at the time of my decease, a sum of £100.' To this legacy the plaintiff's title would be clear and unexceptionable, but for the circumstance that another man, also called William Reynolds, was also in the service and employment of the testator at the time his will was made, and at the time of his death. By this other William Reynolds the money was claimed and, whether rightly or erroneously, paid to him by the executors,—the truth being that it certainly would have been correct to consider him as the legatee if the plaintiff had never been in the testator's service, assuming, as I do, that there was not a third William Reynolds.

"The only question of any difficulty is, I suppose, whether, at the time of the will being made, the William Reynolds who is not the plaintiff was one of the testator's 'farming men,' or a person to

131. In *Selwood* v. *Mildmay*,[q] the testator, by his [102] will, dated the 26th of January, 1796, gave to his wife, E. M., the interest and proceeds of £1250, "part of my stock in the £4 per cent. annuities of

[whom, without impropriety or inaccuracy, the description of one of his farming men was then actually applicable? If this question ought to be answered in the negative, the plaintiff is, I think, entitled to a decree; if it ought to be answered in the affirmative, I consider the evidence goes to show that the legacy was intended for the other William Reynolds and not for the plaintiff.

"The testator, a Northamptonshire gentleman, who was, I think, a bachelor or a widower without family, seems to have been one of those persons of unostentatious habits who prefer the realities to the fancies of life. He farmed 200 or 300 acres of land, or more, wholly or partly his own. He employed upon his farm eight or nine farming men, if not more, of whom Ainge, mentioned in his will as one of his farming men, was his overseer, or a kind of bailiff, under a less high name. Mr. Luck's domestic establishment seems to have been frugal and rustic. He had only two female servants; one of them a kind of housekeeper. He seems not to have had man or a boy in his service except mere farm labourers, subject to the question whether that description belongs to the person who has received the legacy, or Ainge? This William Reynolds, who has received the legacy, was the only male person, besides the testator, who lived in the house. He seems to have been one of that very useful order of men, well known to some of our old dramatists, who according to the custom which, perhaps more frequently formerly than at present, prevailed as well here as everywhere else, in farming as in other households, turned their hands to anything; which class however, especially since the practice of the division of labour, is fast disappearing. He was, in some sense, a household servant certainly; I do not collect that he waited at table, but he whetted the knives, and cleaned the boots and shoes. I do not say or infer that he attended the dressing-room, if any, of Mr. Luck.

"Whether, in respect of him, the testator was a direct contributor

[q] 3 Ves. jun. 306. See the observations upon this case, in *Miller* v. *Travers*, infra, pl. 181, 189; in *Hiscocks* v. *Hiscocks*, infra, pl. 183, [and in *Lindgren* v. *Lindgren*, infra, pl. 193, note.]

the Bank of England, for and during the term of her natural life, together with such dividends as shall be due upon the said £1250 at the time of my decease;"

[to the revenue, or made himself so, does not appear; but I must believe (always speaking from that portion of the information concerning his manner of life which the materials before me afford), that if he had been taxed with—I do not say taxed for—having a coachman, groom, gardener, footman, valet, or butler, he would have denied the charge; and yet that it would have been incorrect or improper for him to have described Old Will as—or that he was not in the habit of calling him, or that he might not honestly have called him—his groom, his gardener, his footman, his butler, his coachman, or his valet, I am far from sure; since in the exercise of the functions belonging to a majority at least, if not every one of such various departments of service with their very diversified names, this manifold serving man seems to have passed his time, so far as he was not employed in other ministrations, which in a minor degree were at least perfectly ample; for in the morning he milked the cows; he also milked the cows in the evening; he attended to them and the calves; he waited on the pigs; and, in addition to all this, lent a hand occasionally in the rick-yard, or otherwise upon the farm. If then he was coachman, groom, and gardener, if he was valet, footman, and butler, why may he not also have been a farming man? To what other part of that description can the care of cows, calves, or pigs, be treated as belonging,—to say nothing of the rick-yard, or occasional work otherwise on the farm-yard? He boarded, and generally lodged, it is true, in the testator's house; but that does not prove him not to be a 'farming man.' His wages were weekly wages, and, most certainly during a considerable part of his life, he was a farm labourer or a farm servant.

"Upon the whole of the evidence legitimately capable of being regarded upon the question, I am of opinion that the William Reynolds who is not the plaintiff was a person whom, at the time of the will being made, it was not improper or incorrect to designate or describe as one of the testator's 'farming men.' He was in my opinion a farming man, and something, or rather in some things, more; but still a farming man. I dismiss the bill, therefore, although without costs, for I do not consider that the case is altogether free from difficulty."]

and, after the decease of his wife, he gave the said stock to several of his relatives in certain shares and proportions, always calling it his "£4 per cent. stock;" and he disposed of the residue of his estate. The testator had not, at the time of making his will, or at any subsequent time, any £4 per cent. stock. At the time of his death, his personal estate consisted only of some Long Annuities, household furniture, and leaseholds specifically bequeathed. In February, 1792, the testator had some £4 per cent. stock, which he sold out in that month, and with the produce of which he purchased, in the same month, certain Long Annuities. The attorney who drew the will deposed, that when the testator gave him instructions for preparing his will, he gave him, as part of his instructions, a former will, by which he had given divers le- [103] gacies, payable out of his stock in the £4 per cents.; and that, the testator not having informed the deponent that he had sold out the stock, and invested the proceeds in the purchase of Long Annuities, he, the deponent, made the above mistake in the will. The Court was of opinion, upon the evidence above stated, that the mistake should be rectified, and decreed accordingly.

132. This case, although the evidence consisted of facts only, unconnected with the question of intention, cannot, it is conceived, be satisfactorily explained upon the principle of the cases of inaccurate description before referred to.[r] The evidence, in this case, did not

[r] Supra, pl. 65, 66, 67.

establish any correspondence or agreement whatever between the description in the will and that of the subject intended. The testator had not (even imperfectly) described the thing he meant to have described; on the contrary, the evidence clearly proved, that he had by mistake described one thing where he meant another. The case would, in substance, have been the same, if the proceeds of the sale of the testator's £4
[104] per cent. stock had been traced into an investment in land, instead of Long Annuities; in which case, it seems, his intention would have been disappointed.[s]

133. In *Doe* d. *Le Chevalier* v. *Huthwaite*,[t] the testator, after several previous limitations (which had expired at the time of the action brought), devised his estate to "Stokeham Huthwaite, *second* son of John Huthwaite, for life, with remainder to his first and other sons and daughters, in strict settlement; and, in default of such issue, to "John Huthwaite, *third* son of the above-mentioned John Huthwaite, for life;" with remainder to his first and other sons and daughters, in strict settlement. In fact, Stokeham Huthwaite was the third son of John Huthwaite, and John Huthwaite (the devisee) was his second son. The Court was of opinion, that evidence of the state of the testator's family and other circumstances was admissible; and that, upon such evidence being given, the jury might find whether he had made a mistake in the

[s] 3 Ves. jun. 310; *Hiscocks* v. *Hiscocks*, infra, pl. 183.

[t] 3 B. & Ald. 632; [S.C. 8 Taunt. 306.] See the observations upon the case of *Hiscocks* v. *Hiscocks*, infra, pl. 183 et seq.

name of the devisee or not.[u] It would be impossible, in this case, to adopt any construction which the words [105] of the will would not, in some degree, contradict. It is not like the cases referred to in a former page,[x] to which the rule *falsa demonstratio non nocet* was applied. The characteristic of those cases is this,—that the description, so far as it is false, applies to no subject, and so far as it is true, it applies to one subject only. The Court in those cases rejects no words but those which are shown to have no application to any subject. In *Doe* d. *Le Chevalier* v. *Huthwaite*, the entire description in each case was inapplicable to either of the sons, but different parts of each entire description were applicable to each claimant.[y] Neither claimant answered the words in the will. It could, therefore, only be by rejecting from the description of each devisee a part which was applicable to the other of them; or, in other words, it could only be by inference from circumstances, not supported by or reconcilable with the language of the will, that the testator's intention could be effectuated.

134. The cases of *Door* v. *Geary*,[z] *Dobson* v. *Waterman*,[a] *Penticost* v. *Ley*,[b] and *Evans* v. *Tripp*,[c] may also be referred to in this place, as cases respecting [106]

[u] It does not appear that any declarations by the testator were tendered in this case. See infra, pl. 183, *Hiscocks* v. *Hiscocks*. [*Bradwin* v. *Harpur*, Amb. 373.]

[x] Supra, pl. 67.

[y] See 6 Term R. 676, per Lord Kenyon, C. J.

[z] 1 Ves. sen. 255.

[a] 3 Ves. jun. 308, n.

[b] 2 Jac. & W. 207.

[c] 6 Madd. 91.

which it is (at least) doubtful, whether they can be explained upon strict principles of exposition.

135. It may, however, be said of the cases of *Selwood* v. *Mildmay*, *Doe* d. *Le Chevalier* v. *Huthwaite*, and the other cases just referred to, that, inasmuch as the evidence by which the intention was ascertained consisted merely of facts collateral to the question of intention, no qualification of the rule, by which *direct proof of intention* is excluded, is, in those cases, judicially recognized. This must be admitted. The following cases, however, are not open to the same explanation, but recognize and establish the proposition —that *intention*, independently of the language of the will, has, in some cases, been the direct and immediate subject of proof.

136. In *Cheyney's case*,[d] A.D. 1591, it is said, if a man has two sons, both baptized by the name of John, and conceiving that the elder (who has been long absent) is dead, devises his land by his will in writing to his son John generally, and in truth the
[107] elder is living; in this case the younger son may produce witnesses *to prove his father's intent;* and in the same case it is further said,—"And no inconvenience can arise if averment in such case be taken, in case of a devise by will; for he who sees such will, whereby land is devised to his son John, cannot be deceived by any secret invisible averment; for when he sees the devise to his son John, he ought, at his peril, to inquire which John the testator intended,

[d] 5 Rep. 68. [*Bate* v. *Amherst*, Sir T. Raymond, 82.]

which may easily be known by him who wrote the will, and others who were privy to his intent; and if no direct proof can be made of his intent, then the devise is void for the uncertainty."

137. In *Crounden* v. *Clarke*,[e] A.D. 1613, it is said,—if I devise land to my son John, having two of that name, averment *who was meant* shall make this certain.

138. In *Jones* v. *Newman*,[f] a testatrix devised the premises in question to John Cluer, of Calcot, under whom the defendant claimed. The plaintiff gave evidence that, at the time of making the will, there were two John Cluers, father and son; and, therefore, that the devise was to the father, who died before the testatrix, and so the devise lapsed. Upon this, the de- [108] fendant offered to prove, by parol evidence, that the testatrix *intended* to leave it to John Cluer, the son; but the Judge would not suffer it. Upon a motion for a new trial, it was held, per totam Curiam, that the Judge was mistaken.

139. In *Hampshire* v. *Peirce*, before stated,[g] it was proved *by declarations* of the testatrix, that by "the four children," she meant the four children by a second marriage. The Master of the Rolls was clear that this was proper evidence, and acted upon it accordingly.

140. In *Thomas* v. *Thomas*,[h] the devise was as follows:—*Item*, devise to my grand-daughter, Mary

[e] Hobart, 32. [f] 1 Wm. Bl. 60.

[g] Supra, pl. 31, and see *Hiscocks* v. *Hiscocks*, infra, pl. 183.

[h] 6 Term R. 671. See the observations upon this case, in *Hiscocks* v. *Hiscocks*, infra, pl. 183; [and per Lord Brougham, in *Lord Camoys* v. *Blundell*, 1 Ho. Lo. Cas. 794.]

Thomas, of Llechlloyd, in Merthyr parish, the reversion, etc." The testator had a grand-daughter of the name of Elinor Evans, who lived at Llechlloyd, in Merthyr parish, and a great-grand-daughter, Mary Thomas, who lived at Green, in the parish of Llangam, some miles from Merthyr parish. At the trial, the plaintiff's counsel proposed giving parol evidence to show a mistake in the name of the devisee, namely, that when the will was read over to the devisor, he
[109] said there was a mistake in the name of the devisee, but that there was no occasion to alter it, as the place of abode and the parish where the devisee lived were sufficient to ascertain the object of his bounty. The Judge admitted the evidence, but the Jury did not give credit to it. Upon a motion for a new trial, Lord Kenyon, C. J., and Lawrence, J., both expressly said, that, for the purpose of showing whom the testator meant by the ambiguous description in the will, *declarations* by him at the time of making his will were clearly admissible in evidence.

141. In *Price* v. *Page*,[1] Thomas Bell, by his will, after some legacies, gave to —— Price, the son of —— Price, the sum of £100. The plaintiff was the only person who claimed the legacy. Evidence of the relation in which the plaintiff stood to the testator was given; and it was also proved, that the testator *said* he *had* provided, or would provide for the plaintiff, and that he had left him something by his will. This latter evidence was relied upon in the judgment.

[1] 4 Ves. jun. 680. [*Phillips* v. *Barker*, 1 Sm. & Gif. 583.]

142. In *Hodgson* v. *Hodgson*,[k] R. H. devised to the defendant H. several closes, paying £100, he (the testator) owed to J. S., and £100 he owed by bond to [110] one Shaw. It fell out, that the money due upon the bond was not due to Shaw, but was the money of Alice Beck, then the wife of one Fitch. The devisee of the land refused to pay the £100. The plaintiff examined Harvey, who drew the will, who deposed that the testator declared he meant the £100 due to the person who married Mr. Beck, of Lincoln; and another witness deposed, that he meant the debt for which C. was bound as surety. Decreed for the plaintiff, first at the Rolls, and afterwards by the Lord Chancellor, who declared he saw no hurt in admitting collateral proof to make certain the *person* or the *thing* described.

143. *In Beaumont* v. *Fell*,[1] the testator gave a legacy of £500 to Catherine Earnley. No person of that name, but one Gertrude Yardley claimed the legacy. By the proofs it appeared, that the testator's voice, when he made his will, was very low, and hardly intelligible; that the testator usually called this legatee of £500., Gatty, which the scrivener, who took instructions for drawing the will, might easily mistake for Katy; and that the said scrivener, not well understanding who the legatee of £500 was, or what was [111] her name, the testator directed him to J. S. and his wife, to inform him; who afterwards declared that

[k] 2 Vern. 593.

[1] 2 P. Wms. 140. See *Hiscocks* v. *Hiscocks*, infra, pl. 183.

Gertrude Yardley was the person intended. It was moreover proved, that the testator, in his lifetime, had *declared* that he would do well for her by his will. The Court said, that, in that case, the name only was mistaken, and that it was very material that no such person as Catherine Earnley claimed the legacy, which together with the proofs of the testator having a very low voice, and of his having usually called the plaintiff Gatty, instead of Gertrude, and often declared he would do well for her, was sufficient to entitle the plaintiff to the legacy. This case has frequently been referred to with approbation.[m]

144. In *Doe* d. *Westlake* v. *Westlake*,[n] *declarations* of the testator were admitted, for the purpose of proving which of several persons having the same name was intended. It was afterwards decided, that the evidence was inadmissible; but the express ground of the latter decision was, that the will itself ascertained which person was intended.[o]

[112] 145. In *Still* v. *Hoste*,[p] a testatrix, by her will, amongst other legacies, bequeathed the sum of £100 "unto Sophia Still, the daughter of Peter Still, of Russell Square." Peter Still had only two daughters, named respectively Selina and Mary Ann. The attorney who made the will, and another, proved that Selina was the person meant. The Vice-Chancellor

[m] 6 Term R. 676; 7 Term R. 148; 3 Taunt. 156; MS. case, pl. 146, infra; *Miller* v. *Travers*, before the Vice-Chancellor, infra, pl. 147.

[n] 4 B. & A. 57; S. C. supra, pl. 35.

[o] Supra, Proposition II.

[p] 6 Madd. 192.

"There can be little doubt that Selina Still is the person entitled to the legacy, but the other daughter being an infant, let it be referred to the Master to inquire who was the legatee *intended* by the description in the will of the testatrix."

146. In a case (with a copy of which, and of the opinions upon it, the writer of this work has been favoured), a testator devised his estate in the county of A., to B. and her heirs. The testator had not, at the time of making his will, any estate in the county of A. He had estates in four other counties, C., D., E., and F. The estate intended for B. was in the county of E. The evidence by which it was proposed to prove the intention, consisted of the instructions given for preparing the will; the declarations of the testator made to his steward; and a letter he wrote to B. about the time of making his will. The opinions [113] of several gentlemen of the first professional eminence, two of whom now fill high judicial stations in this country, were taken upon this case, and all agreed in thinking the evidence admissible.[q] The case of *Beaumont* v. *Fell* was referred to by one of them as a case in point.

147. The Vice-Chancellor, on the 8th of July, 1830, decided a case, *Miller* v. *Travers*, which went the full length of the MS. case which has been stated, and in

[q] See further, *Altham's case*, 8 Rep. 155; *Harding* v. *Suffolk*, 1 Ch. Rep. 74; 3 Wils. 276; 2 Atk. 239, 240, 373; 1 Bro. C. C. 341; 19 Ves. 654; *Evans* v. *Tripp*, 6 Madd. 91. See, also, note, pl. 193, infra.

its circumstances was scarcely distinguishable from it.[r] In that case, the testator devised all his freehold and real estates whatsoever, situate 'in the county of Limerick' and in the city of Limerick, to trustees therein named and their heirs. At the time of making his will, the testator had no real estate in the county of Limerick, but he had a small real estate in the city of Limerick, and considerable real estates in the county of Clare. The principal question in the cause was, whether evidence was admissible to prove that the testator *intended* his estates in the county of Clare to
[114] pass by the devise, and that the word 'Limerick' was inserted by mistake instead of 'Clare.' The Vice-Chancellor, upon a review of the authorities, was of opinion that such evidence was admissible, and directed an issue upon that principle.

148. The cases above cited exhibit, it is believed, a correct statement of the authorities for admitting evidence *to prove intention*, at the time the first edition of this work was published (January, 1831).

149. Upon this state of the authorities the observations contained between the *line* in the next page and the *line* in page 136 (with the exception of a few explanatory observations, which have since been added) were made. The cases of *Miller* v. *Travers*, *Gord* v. *Need*, and *Hiscocks* v. *Hiscocks* have since been decided, and have settled many of the points to which those observations were applied. The observations, however, are retained in the present edition from an

[r] Since reported, 8 Bing. 244.

apprehension that some points may possibly arise which may not be considered as completely settled by these important cases.

150. From these cases,[s] it appears, that evidence of [115] intention has, in some instances, been permitted, and a class of exceptions to the general rule, by which direct proof of intention is excluded, is thereby established.

151. The principle (if any) upon which the excepted cases, taking them collectively, are founded, is by no means obvious.

152. As to those cases in which the description in the will is applicable indifferently to, and sufficiently describes, more than one subject, the principle upon which they proceed may, perhaps, be explained; for in such cases, although the words do not *ascertain* the subject intended, they do *describe* it. The person held entitled in these cases has answered the description in the will. The effect of the evidence has only been to confine the language within one of its natural meanings. The Court has merely rejected;[t] and the intention which it has ascribed to the testator (sufficiently expressed) remains *in* the will. "An averment to take away *surplusage* is good, but not to increase

[s] *i. e.* Cases prior to *Miller* v. *Travers*, *Gord* v. *Need*, and *Hiscocks* v. *Hiscocks*.

[t] Consider but *qu. Anon.* 8 Vin. 188, (G. a.) pl. 1; *Trimleston* v. *Lloyd*, 1 Bligh, N. S. 449, 451, 476; *Hippesley* v. *Homer*, Turn. & Russ. 48, n.; *Powell* v. *Mouchett*, 6 Madd. 216.

that which is defective in the will of the testator."[u]
[116] Or, perhaps, the more simple explanation is, that the evidence only determines what subject *was known to the testator* by the name or other description he used.[v]

153. The cases, however, in which the descriptive language of the will is *inapplicable with certainty to any subject*, cannot be explained in the same way; nor is it easy to understand how those cases are to be reconciled with the Statute of Frauds. How can it be said, that the will is in writing, so far as it respects the person or thing intended, when it is admitted that the will must be inoperative unless the *intention* of the testator in these respects be proved aliunde? And how can a statute, which makes a writing indispensable, be satisfied, if the thing which is the subject of disposition, or the person who claims the benefit of it, is not described in that writing with certainty sufficient to enable a Court, by the description contained in the writing, to determine their identity? In the case of *Beaumont* v. *Fell*, before referred to, the Master of the Rolls, although he admitted the parol evidence,
[117] said,—"If this had been a grant, nay, had it been a *devise* of land, it had been void, by reason of the mistake both of the Christian and surname." But where is the distinction between a grant and a devise of land for the purpose under consideration?

[u] [Per Anderson, C. J., Godb. 131; and see] 6 Ves. 397; 8 Rep. 155; 8 Bing. 258.

[v] In *Richardson* v. *Watson*, 4 B. & Adol. 800, Parke, J., referring to cases of this description, says,—"Such evidence is admissible to show, not what the testator intended, but *what he understood to be signified by the words he used in the will.*"

154. It has, however, with reference to this point, been urged,[x] that the practice of admitting evidence to prove intention in the excepted cases had obtained at common law before the existence of the statute, and that the practice was properly continued after the statute; for that it was not the intention of the framers of the statute to alter or abridge any legitimate or established modes of expounding a written instrument, but merely to substitute a written for a nuncupative will; that the statute made a writing indispensable in certain cases, in which a writing was previously unnecessary, but left untouched the means of expounding the writing which it required; and that Courts of law, therefore, must, notwithstanding the statute, be at liberty still to avail themselves of the aid of extrinsic evidence, to the full extent to which authority had, before the statute, established its admissibility.

155. This reasoning, however (regard being had to [118] the rules of law independently of the statute), is not conclusive. The statute requires that the will should be in writing, and it cannot be seriously made a question whether this requisition is strictly complied with, in cases in which it is admitted that the will must be disappointed unless the *person* or *thing* intended, that is, in fact, the will itself, as far as the person or thing intended is concerned, be ascertained by means wholly independent of the writing which is called the will. The rule which existed at common law before the

[x] This is the passage in the former edition referred to, supra, pl. 3.

statute, existed only as a rule of convenience, and might be relaxed or straitened as much and as often as convenience, the principle upon which it was founded, made it necessary or expedient to do so. But the statute, by positive enactment, has introduced an arbitrary and absolute rule, independent of all considerations of convenience; and statute law is, necessarily, of a less flexible and accommodating nature[y] than the rules of the common law.

156. Another observation, in answer to this last-mentioned theory, remains. It is true that the practice of admitting extrinsic evidence *to prove intention* [119] had obtained at common law before the statute, except in the special case of the description of the *person* or *thing* being applicable indifferently to more than one subject. Do the earlier authorities, when critically examined, sanction the admissibility of evidence *to prove intention* where the person or thing said to be intended does not answer the description in the will? The earlier cases do not, it is conceived, warrant any such general conclusion, and, with respect to the text writers, their statements all resolve themselves into the *words* of the maxim, which has been reserved for separate consideration,[z] and which, properly explained,[a] appears to be limited to the Proposition (the Seventh) now under consideration.

157. It might, indeed, be argued that the admis-

[y] *Norton* v. *Simmes*, Hobart, 14; *Newman* v. *Newman*, 4 M. & Sel. 66; *Goss* v. *Lord Nugent*, 5 B. & Adol. 58.

[z] Supra, pl. 8. [a] Infra, pl. 209.

sion of extrinsic evidence *to prove intention*, in cases in which the description of the person or thing was wholly inapplicable or inapplicable with certainty to any subject, and the admission of similar evidence, where the description applied indifferently to more than one subject, differs in degree but not in principle,—for that some person or thing must have been intended in the former case; and that, if all but one subject be excluded by means of extrinsic evidence, the person or thing intended by the testator will alone [120] remain,—so that the only difference between the two cases is, that the number of subjects to be rejected, or out of which a selection is to be made, is greater in the one case than the other. In the spirit of this argument, a learned writer has said, "The names of persons appointed to take under wills have been set right by parol evidence, where both the Christian and surname have been mistaken; nor does the statute appear to be violated in this instance; for, in such case, no words are supplied or substituted, but the mistaken appellation in the instrument is applied to the person really intended by it; and the names of persons having no intrinsic meaning, the will is rectified without any addition to the sense."[b]

158. The whole of this reasoning, however, is fallacious. If the statute only required that a nuncupative will should not be set up in opposition to a written will, the reason might be sufficient; but, if the just exposition of the statute be, that the writing which it

[b] Roberts on Frauds, 16, 17.

requires shall of itself *express* the intention of the testator, it is difficult to understand how the statute can be satisfied by a writing merely, if the description it
[121] contains have nothing in common with that of the person intended to take under it, or not enough to determine his identity. To define that which is indefinite, is to make a material addition to the will. Once admit that the *person* or *thing* intended by the testator need not be adequately described in the will, and it is impossible to stop short of the conclusion that a mere mark will in every case supply the place of a proper description. The same observations apply, independently of the statute.

159. Other solutions of the difficulty have been suggested. Thus, it has been said, that extrinsic evidence is admissible in the excepted cases, because the ambiguity, being raised by evidence, may fairly be explained by the same means.[c] If by this were meant only, that where, upon a partial development of circumstances, the intention appeared to be uncertain, a more ample development of circumstances was allowable, the reason would be quite satisfactory; for the whole process would then fall within the ascertained limits of exposition. But, applying it to the actual
[122] state of the authorities, a reasonable hesitation may be felt in admitting its sufficiency. It overlooks the essential difference between the nature and effect of

[c] See 1 W. Bla. 60; 7 T. R. 148; 1 Bro. C. C. 350; Sug. Ven. p. 137, 6th edit. [ch. iii. s. 10, pl. 2, 11th edit.]; 1 Phil. on Ev. p. 531, 7th edit. [vol. 2, p. 387, 10th edit.]; 2 Roberts on Wills, p. 13. [See also 1 Roper on Legacies, 390, 4th edit.]

the evidence which raises the ambiguity, and that by which it is removed. The former is confined to a development of facts with reference to which the will was written, and to which the language of the will expressly or tacitly refers. If the words of the will are applicable to *any* subject, the Court is inflexible in applying them accordingly. If inapplicable to *any* subject, the Court declares that the will expresses no certain intention. It is not until this declaration is explicitly made, that the question of admitting evidence of intention is ever entertained.[d] There is a wide difference, then, between the evidence which is simply explanatory of the proper meaning of the words, and that which, admitting that no certain intention is expressed in the will, is resorted to only for the purpose of proving what it was the testator *intended* to have expressed.[e]

160. Again, by what principle is it that the precise limits are determined, within which evidence of intention has been admitted?

161. It has been shown, that evidence will not be [123] admitted to fill up a total blank in a will.[f] Now, the omission of a name in a will may have arisen from accident or mistake on the part only of the person who prepared the will, just as much as a total misdescription or an insufficient description of the subject intended. The testator himself may have given full

[d] Proposition II., supra, pl. 24, [and see per Sir G. Turner, L. J., in *Horwood* v. *Griffith*, 4 De G. M. & G. 709, supra, page 43.]

[e] See 8 Bing. 247.

[f] Supra, pl. 121.

instructions in the former case, as well as in the latter. If the fact were so, and if an entirely new description of the person or thing intended by a testator may be substituted for one inserted by mistake, or for one which is insufficient and uncertain, why (technical rules apart) should not a description omitted by mistake be supplied by parol evidence also ?[g]

162. It is said, in a work of great reputation,[h] that evidence is inadmissible to fill up a total blank, because, in that case, it is uncertain, *upon the face of the will*, whether the testator had selected the subject to which his words were intended to apply, or not. If, in fact, the testator had not made the selection, the reason would be unanswerable, for then there would be no will [124] to execute. If the testator had made the selection, and had given full instructions to the person who prepared his will, and if the omission was really accidental, the reason can scarcely be deemed satisfactory. To fill up a blank in a will by inserting a name which the testator had really directed to be placed there, is not, in substance, more than substituting a new description, or perfecting one which is useless as it stands.[i] The legatee is no more *in* the will in the latter case than in the former. It would be thought strange advice to be given to professional gentlemen, that if, in preparing a will, they should forget the name of a legatee, they should put in *any* name, rather than leave a blank for the right one. But would not the cases

[g] See 8 Bing. 250, 254. [h] 1 Phil. on Ev. p. 539, 7th ed.
[i] See infra, pl. 181, pages 138, 139.

justify such advice? The mere circumstance that the mistake in the one case is *patent*, and in the other *latent*, will scarcely satisfy the inquirer who looks beyond the letter of a technical rule; and, it is hoped that the professional inquirer will, upon reflection, be satisfied that the technical rule referred to does not support the distinction in question.[k]

163. The same reason, however, admitting its sufficiency to explain the case of a blank, will not explain the unqualified rejection of Mary Holt's evidence [125] in such a case as *Goblet* v. *Beechey*.[1] The testator, in that case, must, upon the face of his will, have intended something; he must have had some particular subject in his mind when he made use of the word upon which the question in that case arose; the only question was, what he meant? Now, either a certain description of the subject of the testator's intention is, or it is not, of the essence of a bequest. If it is so, how are the cases already referred to to be explained? If it is not so, why should not a proper description of the person or the thing intended be, in any case, supplied by averment of intention, provided only there is enough upon the face of the will to show the testator meant some particular person or thing, and the only question is,—Who or what he

[k] Infra, pl. 209, 210.

[1] Appendix, No. 1. The rejection of the evidence of Mary Holt *in the first instance* was unquestionably right; for, until the facts of the case were fully developed, it was impossible for the Court to determine whether the words did or did not sufficiently express the testator's intention.

meant? It may be said, that, in *Goblet* v. *Beechey*, the *substance* of the thing intended was not described; and *Selwood* v. *Mildmay* may be cited to show that relief against mistake is confined to cases in which the *denomination* only has been mistaken. But, is
[126] this distinction satisfactory? If, in *Selwood* v. *Mildmay*,[m] the proceeds of the sale of the testator's £4 per cent. Bank Annuities had been traced into an investment in land instead of Long Annuities, the real mistake would have been just as manifest, and the intention as certain, as in the case which actually occurred; yet, it seems, the Court could not in that case have prevented an intestacy.[n]

164. It is in admitting evidence of intention in any case that the strong act of the Courts is done. Where it is once established, that mistakes in a will may be rectified by evidence of intention, the principle upon which (independently of any particular circumstances of a case) the *denomination*, but not the *substance*, of the thing intended, is permitted to be supplied by extrinsic proof, requires explanation.

165. Again, suppose a testator to declare in his will that he left to A. the estate he had promised (in conversation) to leave to him. If it may be assumed that such a will as this (the conscience of the heir-at-
[127] law not being affected[o]) would not satisfy the Statute

[m] Supra, pl. 131. See also *Evans* v. *Tripp*, ubi supra, pl. 134.

[n] 3 Ves. 310; and see infra, pl. 189.

[o] *Oldham* v. *Litchford*, 2 Freem. 284; *Devenish* v. *Baines*, Prec. in Cha. 3; *Muckleston* v. *Brown*, 6 Ves. 52; *Strickland* v. *Aldridge*, 9 Ves. 516.

of Frauds; and that A. could not, either at law or in equity, successfully claim the estate against the heir-at-law of the testator, upon the evidence of a witness who heard the promise,[p] an additional difficulty will [128] suggest itself;—for, if in that case the testator had affected only to describe the estate and person intended, although he had done so in terms wholly inapplicable to either, it might be successfully contended, upon the authority of the cases stated above, that evidence would be admissible to support the devise, though the witness should only state what he heard the testator say, or what the testator told him.

[p] See *Molineux* v. *Molineux*, Cro. Jac. 144. But see *Beaumont* v. *Fell*, supra, pl. 143. *Qu.* What description by *reference* will satisfy the Statute of Frauds? A description by reference to a *writing* will, it is conceived, be sufficient (*Molineux* v. *Molineux*, ubi supra), although *parol* evidence be necessary to identify the writing referred to. (*Saunderson* v. *Jackson*, 2 Bos. & Pul. 238; *Hodges* v. *Horsfall*, 1 Russ. & M. 116). But, will a description by reference to *words spoken* be sufficient? (*Molineux* v. *Molineux*, ubi supra.) [See upon this point, 1 Jarm. Wills, 2nd ed. pp. 74, et seq., and the cases there cited; and the remarks in 4 Jur. N.S. part 2, p. 100. (February 27th 1858.)]

Qu. If the evidence was strictly admissible under the particular circumstances of *Hodges* v. *Horsfall?* The first question would be, whether the word *plan*, in that case, meant a *document* or a *verbal plan?* Admitting that it meant a document, a second question would be, whether evidence could be given as to which of the several plans laid before them the parties had *agreed to select?* This was a term in the entire agreement which the writing in no way ascertained, and the process does not resemble that of applying similar evidence to show which of two persons or estates *was known* to a testator by a given name. (See *Smart* v. *Prujean*, 6 Ves. 565, and extract from that case, infra, pl. 192, note; *Brodie* v. *St. Paul*, 1 Ves. jun. 326; 9 Ves. 250: *Boydell* v. *Drummond*, 11 East, 141; *Barlow* v. *Rhodes*, 1 Cromp. & Meeson, 439. See also *Dillon* v.

[129] 166. It has, indeed, been suggested to the writer by an intelligent and learned friend, that the case of *Beaumont* v. *Fell*[q] does not authorize the conclusion which has just been stated; for that, in *Beaumont* v. *Fell*, there was some resemblance between *Gatty* (by which name the testator used to call the legatee) and *Katy* (which the scrivener who drew the will might have mistaken for *Gatty*,—see the case); and, consequently, that that case cannot be relied on as an authority for the broad proposition, that a description *wholly dissimilar* from that of the object intended can be corrected by evidence of intention. The point is noticed as deserving attention; but the writer can see no difference, in principle, between a description which

Harris, 3 Bligh, N. S. 321.) In the case of *Shortrede* v. *Cheek*, 1 Adol. & Ellis, 57, a question arose upon the sufficiency of a guarantee, which was in the following words: "You will be so good as to withdraw *the promissory note;* and I will see you at Christmas, when you shall receive from me the amount of it, together with the memorandum of my son's, making in the whole £45." It was suggested that the note was not sufficiently described; but the Court decided otherwise, on the ground that there was *no other note* to which the agreement could apply. Littledale, J., said, "It is true, the letter leaves it uncertain what the note was, and whether it was a note of the father or of the son; and if it had appeared that there were two notes, one given by each, I do not think parol evidence could have been received to show which was meant. So, if there had been two notes in question for the same sum, but of different dates." Parke, J., said, "If it had appeared in proof that there were two notes to which the promise might have applied, there might have been a difficulty as to explaining this by parol testimony." The above observations of the judges are in accordance with the author's criticisms on the case of *Hodges* v. *Horsfall*, with reference to the *plan* mentioned in that case.

[q] Supra, pl. 143.

is wholly inapplicable, and one which is so insufficient as to be useless, until it is proved as an independent fact, for whom or for what the description was intended. The suggestion, moreover, does not meet the case of *Selwood* v. *Mildmay*,[r] nor the MS. case of several estates in different counties, *supra*, pl. 146; nor that of *Miller* v. *Travers*, as decided by the Vice-Chancellor, *supra*, pl. 147. The common maxim, which distinguishes *latent* and *patent* ambiguities,[s] has, moreover, always been considered by text writers as sanctioning the case of *Beaumont* v. *Fell*, so understood; and the Vice-Chancellor must have so understood the law when he decided the case of *Miller* v. *Travers*. [130]

167. Again, if where the description of the subject intended is applicable indifferently to more subjects than one, evidence of intention is admissible to determine its application, why should not such evidence (according to the opinion expressed by Lord Cowper,[t]) be admissible in all cases to determine the application of words which are capable of various interpretations?

168. The Decisions, then, in the excepted cases, must, it is conceived, be considered to a great extent as arbitrary, and not to be explained upon any determinate principle. They appear to be decisions in which a general principle has been sacrificed to meet the hardship of particular cases.

[r] Supra, pl. 131. [s] Infra, pl. 196. [t] Supra, pl. 109.

169. The precise conclusions to be drawn from them are by no means obvious.

170. It is observable that they are confined to cases in which the object of the testator's bounty, or the subject of disposition, was the only point to be determined by the evidence.

[131] 171. The authorities do not, however, embrace every case in which the intention of the testator is ambiguous as to the object or the subject intended.[u]

172. With respect to the cases in which the ambiguity related to the object of the testator's bounty, it is observable, that they were cases in which the will expressed a determinate intention in favour of some particular person; but the particular person intended was uncertain; either because the name or description of such person was applicable indifferently to more persons than one; or, because it was inapplicable with certainty[v] to any person.

173. The same reason which prevailed for admitting evidence of intention to correct an ambiguity as to the person, would, it is conceived, apply to an ambiguity as to the subject of disposition, where the ambiguity arose from a similar cause, provided the *substance* or *nature* of the subject intended were defined by the language of the will.[w]

[u] Supra, Proposition VI.

[v] See pl. 133, 146.

[w] See MS. case, pl. 146; 3 Ves. jun. 310: *Miller* v. *Travers*, p. 147.

174. Such was the state of the authorities respecting the admissibility of extrinsic evidence to prove *intention*, and such the difficulties which appeared to oppose themselves to its admission, prior to the decision of the appeal in *Miller* v. *Travers*, *infra*. [132]

175. The description of cases in which such evidence had been held admissible prior to this decision, were two: 1, Those in which the description in the will applied indifferently to more than one subject; and, 2, those in which it was inapplicable with certainty to any subject.

176. Since the decision in *Miller* v. *Travers*, the cases of *Gord* v. *Needs*, and *Hiscocks* v. *Hiscocks* have have been decided.

177. The question raised in *Miller* v. *Travers* was, whether evidence to prove *intention*, as distinguished from *explanatory evidence*,[x] was admissible to show that estates in the county of Clare were intended by the description "Estates in the county of Limerick?" in other words,—whether a description wholly inapplicable in itself to the subject said to be intended, could be applied to that subject by force only of evidence of the testator's intention? And it was held that the evidence was inadmissible.

178. The question in *Gord* v. *Needs*,[y] was whether evidence was admissible, to show which of two claimants, *each answering the description in the will*, was intended by the testator? And it was held that the evidence was admissible. [133]

[x] Supra, pl. 10. [y] Infra, pl. 182.

179. In *Hiscocks* v. *Hiscocks*,[a] the question raised was, whether similar evidence was admissible for the purpose of enabling the Court to apply to each of two claimants, respectively, one of two descriptions in a will, neither of which was applicable with legal certainty to either claimant? and it was held that the evidence was inadmissible.

180. In the state of the authorities which has been shown, the case of *Miller* v. *Travers* came before the Lord Chancellor, on appeal from the decision of the Vice-Chancellor, already stated.[a] His Lordship called in the asistance of Chief Justice Tindal, and the Lord Chief Baron, (Lord Lyndhurst), before whom the case was argued, and, on the 28th of January, 1833, Chief Justice Tindal delivered the unanimous opinion of the three Judges, deciding that the evidence to prove that the testator intended to devise his estates in the county of Clare was inadmissible, and that the order of the Vice-Chancellor, directing the issue, should be reversed.

[134] 181. The judgment,[b] after observing that the main question between the parties was, whether parol evidence was admissible to show the testator's intention that his real estates in the county of Clare should pass by his will, and stating the facts of the case,[c] proceeded as follows :—"It may be admitted, that in all cases in which a difficulty arises in applying the words of a

[a] Infra, pl. 183. [a] Supra, pl. 147.

[b] 8 Bing. 244. [See the observations on this case in *Lindgren* v. *Lindgren*, 9 Beav. 364; infra, pl. 194, note.]

[c] Supra, pl. 147.

will to the thing which is the subject-matter of the devise, or to the person of the devisee, the difficulty or ambiguity which is introduced by the admission of extrinsic evidence may be rebutted and removed by the production of further evidence, *upon the same subject*, calculated to explain what was the estate, or subject-matter, really intended to be devised, or who was the person really intended to take under the will; and this appears to us to be the extent of the maxim, '*Ambiguitas verborum latens, verificatione suppletur.*'

"But the cases to which this construction applies will be found to range themselves into two separate classes, distinguishable from each other, and to neither of which can the present case be referred. The first class is, where the description of the thing devised, or [135] of the devisee, is clear upon the face of the will; but upon the death of the testator it is found, that there are more than one estate or subject-matter of devise, or more than one person whose description follows out and fills the words used in the will. As where the testator devises his manor of Dale, and at his death it is found that he has two manors of that name, South Dale and North Dale; or where a man devises to his son John, and he has two sons of that name. In each of these cases respectively, parol evidence is admissible to show which manor was intended to pass, and which son was intended to take. (*Bac. Max.* 23; *Hob. Rep.* 32; *Edward Altham's case*, 8 Rep. 155.)[d] The other class of cases is that in which the descrip-

[d] Infra, pl. 184.

tion contained in the will of the thing intended to be devised, or of the person who is intended to take, is true in part, but not true in every particular. As where an estate is devised called A., and is described in the occupation of B., and it is found that though there is an estate called A., yet the whole is not in B.'s occupation; or where an estate is devised to a person whose surname or Christian name is mistaken; or [136] whose description is imperfect or inaccurate; in which latter class of cases parol evidence is admissible to show what estate is intended to pass, and who was the devisee intended to take, provided there is sufficient indication of intention appearing on the face of the will to justify the application of the evidence.

"But the case now before the Court does not appear to fall within either of these distinctions. There are no words in the will which contain an imperfect, or, indeed, any description whatever of the estates in Clare. The present case is rather one in which the plaintiff does not endeavour to apply the description contained in the will to the estates in Clare, but, in order to make out such intention, is compelled to introduce new words and a new description into the body of the will itself.

"The testator devises all his estates in the county of Limerick and the city of Limerick. There is nothing ambiguous in this devise on the face of the will. It is found, upon inquiry, that he had property in the city of Limerick, which answers to the description in the will, but no property in the county. This extrin-

sic evidence produces no ambiguity, no difficulty in the application of the words of his will to the state of the property as it really exists.[e] The natural and ne- [137]
cessary construction of the will is, that it passes the estate which he has in the city of Limerick, but passes no estate in the county of Limerick, where the testator had no estate to answer that description.

"The plaintiff, however, contends, that he has a right to prove, that the testator intended to pass not only the estate in the city of Limerick, but an estate in a county not named in the will, namely, the county of Clare; and that the will is to be read and construed as if the word 'Clare' stood in the place of, or in addition to, that of Limerick.

"But this, it is manifest, is not merely calling in the aid of extrinsic evidence to apply the intention of the testator, *as it is to be collected from the will itself,* † *to the existing state of his property; it is calling in extrinsic evidence to introduce into the will an intention not apparent upon the face of the will.* It is not simply removing a difficulty, arising from a defective or mistaken description; it is making the will speak upon a subject on which it is altogether silent, and is the same in effect *as the filling up a blank,* which the testator might have left in his will. It amounts, in short, by the admission of parol evidence, to the making of a new devise for the testator, which he is supposed to have omitted.

"Now, the first objection to the introduction of such [138]

[e] Infra, pl. 188.

evidence is, that it is inconsistent with the rule which reason and sense lay down, and which has been universally established for the construction of wills, namely, that the testator's intention is to be collected from the words used in the will, and that words which he has not used cannot be added. *Denn* v. *Page*.[f]

"But it is an objection no less strong, that the only mode of proving the alleged intention of the testator is, by setting up the draft of the will against the executed will itself. As, however, the copy of the will which omitted the name of the county of Clare was for some time in the custody of the testator, and, therefore, open for his inspection; which copy was afterwards executed by him with all the formalities required by the Statute of Frauds; the presumption is, that he must have seen and approved of the alteration, rather than that he overlooked it by mistake. It is unnecessary to advert to the danger of allowing the draft of the will to be set up as of greater authority to evince the intention of the testator than the will itself, after the will has been solemnly executed, and after the death of the testator. If such evidence is admissible to introduce a new subject-matter of devise, why not [189] also to introduce the name of a devisee, altogether omitted in the will? If it is admissible to *introduce* new matter of devise, or a new devisee, why not to *strike out* such as are contained in the executed will? The effect of such evidence in either case would be, that the will, though made in form by the testator in

[f] 3 Term R. 87.

his lifetime, would really be made by the attorney after his death; that all the guards intended to be introduced by the Statute of Frauds would be entirely destroyed, and the statute itself virtually repealed.

"And upon examination of the decided cases on which the plaintiff has relied in argument, no one will be found to go the length of supporting the proposition which he contends for; on the contrary, they will all be found consistent with the distinction above adverted to,—that an uncertainty, which arises from applying the description contained in the will either to the thing devised, or to the person of the devisee, may be helped by parol evidence; but that a new subject-matter of devise, or a new devisee, where the will is entirely silent upon either, cannot be imported by parol evidence into the will itself.

"Thus, in the case of *Lowe* v. *Lord Huntingtower*,[g] in which it was held that evidence of collateral circum- [140] stances was admissible, as of the ages of the several devisees named in the will, of the fact of their being married or unmarried, and the like, for the purpose of ascertaining the true construction of the will; such evidence, it is to be observed, is not admitted to introduce new words into the will itself, but merely to give a construction to the words used in the will consistent with the real state of his property and family; the evidence is produced to prove facts, which, according to the language of Lord Coke, in 8 Rep. 155, 'stand well with the words of the will.'

[g] 4 Russ. Rep. 581, n.

"The case of *Standen* v. *Standen*[h] decides no more, than that a devise of all the residue of the testator's real estate, where he has no real estate at all, but has a power of appointment over real estate, shall pass such estate over which he has the power, though the power is not referred to. But this proceeds upon the principle that the will would be altogether inoperative, unless it is taken that, by the words used in the will, the testator meant to refer to the power of appointment.

"The case of *Mosley* v. *Massey*,[i] does not appear [141] to bear upon the question now under consideration. After the parol evidence had established that the local description of the two estates mentioned in the will had been transposed by mistake, the county of Radnor having been applied to the estate in Monmouth and *vice versâ*; the Court held that it was sufficiently to be collected, from the words of the will itself, which estate the testator meant to give to the one devisee, and which to the other, independent of their local description; all, therefore, that was done, was to reject the local description, as unnecessary, and not to import any new description into the will.

"In the case of *Selwood* v. *Mildmay*,[k] the testator devised to his wife part of his stock in the £4 per cent. Annuities of the Bank of England; and it was shown by parol evidence, that, at the time he made his will, he had no stock in the £4 per cent. Annuities, but

[h] 2 Ves. jun. 589. [i] 8 East, 149.
[k] 3 Ves. jun. 306. [Supra, page 111.]

that he had some which he had sold out, and had invested the produce in Long Annuities. And in this case it was held, that the bequest was in substance a bequest of stock, using the words as a denomination, not as the identical *corpus* of the stock; and as none could be found to answer the description but the Long [142] Annuities, it was held that such stock should pass rather than the will be altogether inoperative.

"This case is certainly a very strong one; but the decision appears to us to range itself under the head, that 'falsa demonstratio non nocet,' where enough appears upon the will itself to show the intention after the false description is rejected.[1]

"The case of *Goodtitle* v. *Southern*[m] falls more closely within the principle last referred to. A devise 'of all that my farm called *Trogue's Farm*, now in the occupation of A. C.' Upon looking out for the farm devised, it is found that part of the lands which constituted Trogue's Farm are in the occupation of another person. It was held, that the thing devised was sufficiently ascertained by the devise of '*Trogue's Farm*,' and that the inaccurate part of the devise might be rejected as surplusage.

"The case of *Day* v. *Trigg*[n] ranges itself precisely in the same class. A devise of 'all the testator's freehold houses in Aldersgate-street,' when, in fact, he had no freehold, but had leasehold houses there. The [143] devise was held in substance and effect to be a devise

[1] See *Hiscocks* v. *Hiscocks*, infra, pl. 183.

[m] 1 M. & S. 299. [n] 1 P. Wms. 286.

of his *houses* there; and that, as there were no freehold houses there to satisfy the description, the word 'freehold' should rather be rejected than the will be totally void.

"But neither of these cases afford any authority in favour of the plaintiff; they decide only that where there is a sufficient description in the will to ascertain the thing devised, a part of the description which is inaccurate may be rejected, not that anything may be added to the will; thus following the rule laid down by Anderson, C.J., in Godb. Rep. 131:—'An averment to take away any surplusage is good, but not to increase that which is defective in the will of the testator.'[o]

"On the contrary, the cases against the plaintiff's construction appear to bear more closely on the point. In the first place, it is well established, that where a complete blank is left for the name of a legatee or devisee, no parol evidence, however strong, will be allowed to fill it up as intended by the testator. *Hunt* v. *Hort*,[p] and in many other cases.

[144] "Now the principle must be precisely the same, whether it is the person of the devisee, or the estate or thing devised, which is left altogether in blank. And it requires a very nice discrimination to distinguish between the case of a will, where the description of the estate is left altogether in blank, and the present case, where there is a total omission of the estates in Clare.

[o] Infra, pl. 190.

[p] 3 Bro. C. C. 311.

"In the case of *Doe* d. *Oxenden* v. *Chichester*,[q] it was held by the House of Lords, in affirmance of the judgment below, that, in the case of a devise of 'my estate of Ashton,' no parol evidence was admissible to show that the testator intended to pass not only his lands in Ashton, but in the adjoining parishes, which he had been accustomed to call by the general name of his Ashton estate. The Chief Justice of the Common Pleas, in giving the judgment of all the Judges, says, 'If a testator should devise his lands of or in Devonshire or Somersetshire, it would be impossible to say that you ought to receive evidence that his intention was to devise lands out of those counties.' Lord Eldon, then Lord Chancellor, in page 90 of the Report, had stated in substance the same opinion. The case so put by Lord Eldon and the Chief Justice is the very case now under discussion.

"But the case of *Newburgh* v. *Newburgh*, decided in [145] the House of Lords on the 16th of June, 1825,[1] appears to be in point with the present. In that case, the appellant contended that the omission of the word '*Gloucester*' in the will of the late Lord Newburgh, proceeded upon a mere mistake, and was contrary to the intention of the testator at the time of making his will, and insisted that she ought to be allowed to prove, as well from the context of the will itself, as from other extrinsic evidence, that the testator intended to devise

[q] 4 Dow, P.C. 65. [Supra, page 25.]

[1] [1 M. & Sc. 352, on appeal from Sir John Leach, V.C., 5 Madd. 364.]

to her an estate for life as well in the estate in Gloucester, which was not inserted in the will, as in the county of Sussex, which was mentioned therein.

"The question, 'whether parol evidence was admissible to prove such mistake, for the purpose of correcting the will and entitling the appellant to the Gloucester estate, as if the word 'Gloucester' had been inserted in the will,' was submitted to the Judges; and Lord Chief Justice Abbott declared it to be the unanimous opinion of those who had heard the argument, that it could not.

"As well, therefore, upon the authority of the cases, and more particularly of that which is last referred to, as upon reason and principle, we think the evidence [146] offered by the plaintiff would be inadmissible upon the trial of the issue, and that it would, therefore, be useless to grant the issue in the terms directed by the Vice-Chancellor."

182. In *Doe* d. *Gord* v. *Needs*,[o] the will contained a devise to George Gord, the son of John Gord; another to George Gord, the son of George Gord; and a third, after the expiration of certain life estates, to *George Gord, the son of Gord.* The Court held, that the evidence of the testator's declarations was admissible to show that he intended that the house devised to "George, the son of Gord," should go to George, the son of George Gord. The rule of law is so fully explained in this case, that the author trusts he shall be excused for inserting the judgment at

[o] 2 M. & W. 129.

length, notwithstanding the reasons which may suggest themselves to the reader, why he should have omitted it. "The only point, therefore," said Parke, B.,[p] "remaining to be considered is, whether evidence was properly admitted of the devisor's declarations to show what person he meant to designate by the description of 'George Gord, the son of Gord.' And we are of opinion that such evidence was properly admitted. If, upon the face of the devise, it had been uncertain whether the devisor had selected a particular [147] object of his bounty, no evidence would have been admissible to prove that he intended a gift to a certain individual; such would have been a case of *ambiguitas patens*, within the meaning of Lord Bacon's rule,[q] which ambiguity could not be holpen by averment; for to allow such evidence would be, with respect to that subject, to cause a parol will to operate as a written one; or, adopting the language of Lord Bacon, 'to make that pass without writing, which the law appointeth shall not pass but by writing.' But here, on the face of the devise, no such doubt arises. There is no *blank* before the name of Gord the father, which might have occasioned a doubt whether the devisor had finally fixed on any *certain* person in his mind. The devisor has clearly selected a particular individual as the devisee. Let us then consider, what would have been the case, if there had been no mention in the will of any *other* George Gord the son of a Gord: on that supposition there is no doubt, upon the au-

[p] 2 M. & W. 139. [q] Maxims, 25.

thorities, but that evidence of the testator's intention, as proved by his declarations, would have been admissible. Upon the proof of extrinsic facts, which is
[148] always allowed in order to enable the Court to place itself in the situation of the devisor, and to construe his will, it would have appeared that there were at the date of the will *two* persons, to each of whom the description would be equally applicable. This clearly resembles the case put by Lord Bacon of a *latent* ambiguity, as where one grants his manor of S. to J. F. and his heirs, and the truth is that he has the manors both of North S. and South S.; in which case Lord Bacon says, 'It shall be holpen by averment, whether of them was that which the party intended to pass.' The case is also exactly like that mentioned by Lord Coke in *Altham's case*;[r] 'If A. levies a fine to William his son, and A. has two sons named William, the averment that *it was his intent* to levy the fine to the younger is good, and *stands well with the words of the fine.*' Another case is put in *Crounden* v. *Clarke*[s] which is in point: 'If one devise to his son John, where he has two sons of that name:' and the same rule was acted upon in the recent case of *Doe* v. *Morgan*.[t] The characteristic of all these cases is, that the words of the will *do* describe the object or subject
[149] intended; and the evidence of the declarations of the testator has not the effect of varying the instrument in any way whatever; it only enables the Court to reject one of the subjects or objects, to which the description

[r] 8 Rep. 155 a. [s] Hob. 32. [t] 1 C. & M. 235.

in the will applies; and to determine which of the two the devisor understood to be signified by the description which he used in the will. This subject has been most ably discussed by Mr. Wigram, in his excellent treatise on the rules of law respecting the admission of extrinsic evidence in the interpretation of wills. There would, then, have been no doubt whatever of the admissibility of evidence of the devisor's intention, if the devise to 'George the son of Gord,' had stood alone, and no mention had been made in the will of George the son of *John* Gord, and George the son of *George* Gord. But does the circumstance that there are two persons named in the will, each answering the description of 'George the son of Gord,' prevent the application of this rule? We are of opinion that it does not. In truth the mention of persons by those descriptions in other parts of the will, has no more effect, for this purpose, than proof by extrinsic evidence of the existence of such persons, and that they were known to the devisor, would have had: it shows that there were two persons, to either of whom the description would be applicable, and that such two persons were both known: and the present case really amounts to no more than this, that the person to whom the imperfect description appears on the parol evidence to apply, is described in other parts of the same will, by a more full and perfect description, which excludes any other object than himself. Still he is pointed out in the devise itself by a description, which, so far as it goes, is perfectly correct. In the case of *Doe* v. [150]

Morgan, above referred to, precisely the same circumstance occurred."[2]

183. In *Hiscocks* v. *Hiscocks*,[u] a testator devised lands to his son John for life; and, from his decease, to the testator's grandson, John H., *eldest son* of the said John H., for life, with remainders over. At the
[151] time of making his will, the testator's son John H. had been twice married. By his first wife he had one son Simon, and by his second wife an eldest son John, and other younger children, sons and daughters. Simon and John, the grandsons of the testator, both claimed the lands. The question was, whether evidence of the testator's *intention*, consisting of instructions given for his will, and declarations made by him after his will, were admissible. The judgment of the Court was as follows:—"This was an action of ejectment brought on the demise of Simon Hiscocks against John Hiscocks. The question turned on the words of a devise in the will of Simon Hiscocks, the grandfather of the lessor of the plaintiff and of the defendant. By his will, Simon Hiscocks, after devising estates to his son

[2] [See *Doe* d. *Allen* v. *Allen*, 12 Ad. & Ell. 451.]

[u] 5 M & W. 363 (1832). The only way (if any) by which, in this case, either claimant could have approached the end he aimed at, would, perhaps, have been by contending that the words in the will, which were applicable to his opponent, were ***not the testator's words*** (see the cases, supra, pl. 152, note [s]). This point was not open in the argument in the Exchequer, as the whole instrument appears to have been proved or admitted to contain nothing but the testator's words. The effect, however, of striking out words (as not being the words of the testator) in a case like *Hiscocks* v. *Hiscocks*, would be the opposite of that in the cases above referred to in this note. It would create a devise and not an intestacy.

Simon for life, and, from and after his death, to his grandson Henry Hiscocks in tail male, and making, as to certain other estates, an exactly similar provision in favour of his son John for life; then, after his death, the testator devises those estates to 'my grandson John Hiscocks, eldest son of the said John Hiscocks.' It is on this devise that the question wholly turns. In fact, John Hiscocks the father had been twice married; by his first wife he had Simon, the lessor of the plaintiff, his eldest son: the eldest son of the second marriage was John Hiscocks, the defendant. The devise, [152] therefore, does not, both by name and description, apply to either the lessor of the plaintiff, who is the eldest son, but whose name is Simon, nor to the defendant, who, though his name is John, is not the eldest son. The cause was tried before Mr. Justice Bosanquet, at the Spring Assizes for the county of Devon, 1838, and that learned Judge admitted evidence of the instructions of the testator for the will, and of his declarations after the will was made, in order to explain the ambiguity in the devise, arising from this state of facts; and the verdict having been found for the lessor of the plaintiff, a rule has been obtained for a nonsuit or new trial, on the ground that such evidence of intention was not receivable in this case. And after fully considering the question, which was very well argued on both sides, we think that there ought to be a new trial. It must be admitted, that it is not possible altogether to reconcile the different cases that have been decided on this subject; which makes

it the more expedient to investigate the principles upon which any evidence to explain the will of a testator ought to be received. The object in all cases is to discover the intention of the testator. The first and most obvious mode of doing this is to read his will as he has written it, and collect his intention from his words.

[158] But as his words refer to facts and circumstances respecting his property and his family, and others whom he names or describes in his will, it is evident that the meaning and application of his words cannot be ascertained, without evidence of all those facts and circumstances. To understand the meaning of any writer, we must first be apprised of the persons and circumstances that are the subjects of his allusions or statements; and if these are not fully disclosed in his work, we must look for illustration to the history of the times in which he wrote, and to the works of contemporaneous authors. All the facts and circumstances, therefore, respecting persons or property, to which the will relates, are undoubtedly legitimate and often necessary evidence, to enable us to understand the meaning and application of his words. Again,—the testator may have habitually called certain persons or things by peculiar names, by which they were not commonly known. If these names should occur in his will, they could only be explained and construed by the aid of evidence to show the sense in which he used them, in like manner as if his will were written in cipher, or in a foreign language. The habits of the testator in these particulars must be receivable as evidence to ex-

plain the meaning of his will. But there is another [154]
mode of obtaining the intention of the testator, which is by evidence of his declarations, of the instructions given for his will, and other circumstances of the like nature, which are not adduced for explaining the words or meaning of the will, but either to supply some deficiency, or remove some obscurity, or to give some effect to expressions that are unmeaning or ambiguous. Now, there is but one case in which it appears to us that this sort of evidence of intention can properly be admitted, and that is, where the meaning of the testator's words is neither ambiguous nor obscure, and where the devise is on the face of it perfect and intelligible, but, from some of the circumstances admitted in proof, an ambiguity arises, as to which of the two or more things, or which of the two or more persons (each answering the words in the will), the testator intended to express. Thus, if a testator devise his manor of S. to A. B., and has two manors of North S. and South S., it being clear he means to devise one only, whereas both are equally denoted by the words he has used, in that case there is what Lord Bacon calls 'an equivocation,' *i. e.*, the words equally apply to either manor, and evidence of previous intention may be received to solve this latent ambiguity; for the intention shows what he meant to do; and when you know that, [155]
you immediately perceive that he has done it by the general words he has used, which, in their ordinary sense, may properly bear that construction. It appears to us, that, in all other cases, parol evidence of what

was the testator's intention ought to be excluded, upon this plain ground, that his will ought to be made in writing; and if his intention cannot be made to appear by the writing, explained by circumstances, there is no will. It must be owned, however, that there are decided cases which are not to be reconciled with this distinction in a manner altogether satisfactory. Some of them, indeed, exhibit but an apparent inconsistency. Thus, for example, in the cases of *Doe* v. *Huthwaite*[x] and *Bradshaw* v. *Bradshaw*,[y] the only thing decided was, that, in a case like the present, *some* parol evidence was admissible. There, however, it was not decided that evidence of the testator's intention ought to be received. The decisions, when duly considered, amount to no more than this, that where the words of the devise, in their primary sense, when applied to the circumstances of the family and the property, make the devise insensible, collateral facts may be resorted [156] to, in order to show that in some secondary sense of the words—and one in which the testator meant to use them—the devise may have a full effect. Thus, again, in *Cheyney's case*, and in *Crounden* v. *Clarke*, 'the averment is taken' in order to show which of two persons, *both equally described* within the words of the will, was intended by the testator to take the estate; and the late cases of *Doe* d. *Morgan* v. *Morgan*,[3] and *Doe* d. *Gord* v. *Needs*,[4] both in this Court, are to the same effect. So, in the case of *Jones* v. *Newman*, ac-

[x] Supra, pl. 133.
[y] Infra, pl. 183, note [f].
[3] [1 Cr. & M. 235.]
[4] [Supra, p. 148.]

cording to the view the Court took of the facts, the case may be referred to the same principles as the former. The Court seem to have thought the proof equivalent only to proof of there being two J. C.'s, strangers to each other, and then the decision was right, it being a mere case of what Lord Bacon calls equivocation. The cases of *Price* v. *Page*,[5] *Still* v. *Hoste*,[z] and *Careless* v. *Careless*,[6] do not materially vary in principle from those last cited. They differ, indeed, in this, that the equivocal description is not entirely accurate; but they agree in its being (although inaccurate) equally applicable to each claimant; and they all concur in this, that the inaccurate part of the description is either, as in *Price* v. *Page*, a mere blank, [157] or, as in the other two cases, applicable to no person at all. These, therefore, may fairly be classed also as cases of equivocation; and, in that case, evidence of the intention of the testator seems to be receivable. But there are other cases not so easily explained, and which seem at variance with the true principles of evidence. In *Selwood* v. *Mildmay*,[a] evidence of instructions for the will was received. That case was doubted in *Miller* v. *Travers*;[7] but perhaps, having been put by the Master of the Rolls as one analogous to that of the devise of all a testator's freehold houses in a given place, where the testator had only leasehold houses,

[z] 6 Madd. 192; supra, pl. 112.

[a] 3 Ves. jun. 306; supra, pl. 131.

[5] [Supra, page 118.] [6] [1 Mer. 384.]

[7] [See observations on this judgment in *Lindgren* v. *Lindgren*, 9 Beav. 365; infra, pl. 194, note.]

it may, as suggested by Lord Chief Justice Tindal in *Miller* v. *Travers*, be considered as being only a wrong application to the facts of a correct principle of law. Again, in *Hampshire* v. *Pierce*, Sir John Strange admitted declarations of the intentions of the testatrix to be given in evidence, to show that by the words, 'the four children of my niece Bamfield,' she meant the four children by the second marriage. It may well be doubted whether this was right, but the decision on the whole case was undoubtedly correct; for the circumstances of the family, and their ages, which
[158] no doubt were admissible, were quite sufficient to have sustained the judgment without the questionable evidence. And it may be further observed, that the principle with which Sir J. Strange is said to have commenced his judgment, is stated in terms much too large, and is so far inconsistent with later authorities. *Beaumont* v. *Fell*,[b] though somewhat doubtful, can be reconciled with true principles, upon this ground, that there was no such person as Catherine Earnley, and that the testator was accustomed to address Gertrude Yardley by the name of Gatty. This, and other circumstances of the like nature, which were clearly admissible, may perhaps be considered to warrant that decision; but there the evidence of the testator's declarations as to his intention of providing for Gertrude Yardley was also received; and the same evidence was received at Nisi Prius in *Thomas* v. *Thomas*,[c] and approved on a motion for a new trial, by the dicta of

[b] Supra, pl. 143. [c] Supra, pl. 140.

Lord Kenyon and Mr. Justice Lawrence. But these cases seem to us at variance with the decision in *Miller* v. *Travers*, which is a decision entitled to great weight. If evidence of intention could be allowed for the purpose of showing that by Catherine Earnley and [159] Mary Thomas, the respective testators meant Gertrude Yardley and Elinor Evans, it might surely equally be adduced to prove that, by the county of Limerick, a testator meant the county of Clare. Yet this was rejected, and we think rightly. We are prepared on this point (the point in judgment in the case of *Miller* v. *Travers*) to adhere to the authority of that case. Upon the whole, then, we are of opinion, that in this case there must be a new trial. Where the description is partly true as to both claimants, and no case of equivocation arises, what is to be done is to determine whether the description means the lessor of the plaintiff or the defendant. The description, in fact, applies partially to each, and it is not easy to see how the difficulty can be solved. If it were *res integra*, we should be much disposed to hold the devise void for uncertainty; but the cases of *Doe* v. *Huthwaite*,[d] *Bradshaw* v. *Bradshaw*,[e] and others, are authorities against this conclusion. If therefore, by looking at the surrounding facts to be found by the jury, the Court can clearly see, with the knowledge which arises from those facts alone, that the testator meant either the lessor of the plaintiff or the defendant, it may so decide, and direct the jury accordingly; but we think [160]

[d] Supra, pl. 133. [e] Infra, next page, note.

that, for this purpose, they cannot receive declarations of the testator of what he intended to do in making his will. If the evidence does not enable the Court to give such a direction to the jury, the defendant will indeed for the present succeed; but the claim of the heir-at-law will probably prevail ultimately, on the ground that the devise is void for uncertainty." [f]

Observations upon the Judgments in Miller v. *Travers, on appeal, Gord* v. *Needs, and Hiscocks* v. *Hiscocks.*

184. I. From these judgments it will appear, that the decisions have affirmed the doctrine, that where the description, in the will, of the *person* or *thing* intended, is applicable with legal certainty to each of se-
[161] veral subjects, extrinsic evidence is admissible to prove which of such subjects was intended by the testator.[g]

[f] In *Bradshaw* v. *Bradshaw*, 2 Y. & Coll. 72, the will contained devises to *Robert*, the *second* son of the testator's daughter, E. B., with remainder to his first and other sons in tail male, remainders (as to part of the property) to the *third*, *fourth*, *fifth*, and every other son of E. B. severally and successively in tail male, with remainder to the testator's right heirs. E. B. had no second son named *Robert*. The name of her eldest son was *Robert*, and that of the second son *Henry*. [Suppose a devise to George James the son of William, and that William had two sons named respectively George and James, would evidence be admissible to prove that either was intended?]

[g] Supra, Prop. VII. [In *Hare* v. *Cartridge*, 13 Sim. 165, the testator bequeathed his residue unto and among his first cousins, the children of his father's *brother*, of the name of Cartridge. The testator's father had *two* brothers of that name, both of whom died during the testator's lifetime, leaving children. Sir L. Shadwell

185. The cases of *Richardson* v. *Watson*, already referred to,[h] and *Morgan* v. *Morgan*,[i] are to the same effect.

186. It can scarcely be necessary to observe, that, in order that a case may be brought within the scope of this Proposition, it is not necessary that the description in the will should be in all respects *accurate or perfect*. All that the law requires on this point is, that the description shall be so far perfect as to describe with *legal certainty*[k] each of the subjects to which it is sought to be applied,—it must (as a description) satisfy the mind of the Judge, that it does describe the subject to which he applies it,—it must, as a description, be *sufficient to his mind*.[l]

187. With respect to the particular evidence which

[held that the bequest was not void for uncertainty, but that the children of *both* the brothers were entitled to share in the residue. See also *Richards* v. *Patteson*, 15 Sim. 501.]

[h] Supra, pl. 40.

[i] 1 Cromp. & M. 235.

[k] Supra, pl. 126, and note the judgment in *Hiscocks* v. *Hiscocks* upon this point, supra, pl. 183. [See the author's argument in *Blundell* v. *Gladstone*, 11 Sim. 477.]

[l] Supra, pl. 129. [In *Bennett* v. *Marshall*, 2 Kay & Joh. 740, the testator devised to 'William Marshall, his second cousin.' It appeared that he had no second cousin named William Marshall; but that he had two first cousins once removed, one named William Marshall, *simpliciter*, the other named William John Robert Blandford Marshall. Sir W. P. Wood, V.C., admitted parol evidence as to the intention of the testator, and decided, upon such evidence, that the cousin last named was the one whom he intended to benefit.

In this case, the extrinsic evidence proved, not only that the testator had made a mistake, but that the sense in which he used the words 'second cousin' was 'first cousin once removed,' and appears to have reduced the case as between the two claimants to the same

is admissible for the purpose of determining which of several subjects was intended by the testator,—where [162] the description in the will is applicable to more than one subject,—as the question in such cases is, what the testator *intended* to have expressed; any evidence, which *upon general principles* is relevant and material to that inquiry, will be admissible. And it seems, from the cases which have been referred to, that facts affording an inference of intention,[m] and declarations by the testator at the time of making his will,[n] are equally admissible. Declarations of intention, however, made before[o] or after[p] the date of the will, are, it is said, inadmissible.[q] This distinction does not

[condition as it would have been in had the testator used the words 'first cousin once removed' in his will instead of 'second cousin.'

Could the Court in that case have admitted evidence to prove that the legatee William Marshall, whose description upon this hypothesis was altogether correct, was *not* the person intended, but that W. J. R. B. Marshall, who was incorrectly described, was the person intended?

After hearing the evidence and the arguments thereupon, the Vice-Chancellor is reported to have remarked that, if the evidence had been perfectly balanced, he must have held William Marshall entitled under the devise, in preference to W. J. R. B. Marshall. Was not this an admission, that the object of the testator's bounty was *not* described in terms which were applicable *indifferently* to more than one person? See the Proposition.]

[m] *Selwood* v. *Mildmay*, supra, pl. 131; *Doe* d. *Le Chevalier* v. *Huthwaite*, supra, pl. 133.

[n] *Thomas* v. *Thomas*, 6 T. R. 671, supra, pl. 140, and the cases supra, from pl. 131 to pl. 148.

[o] *Thomas* v. *Thomas*, ubi supra, n. [n]; *Strode* v. *Russell*, 2 Vern. 625; *Oldman* v. *Slater*, 3 Sim. 84.

[p] 2 Vern. 625.

[q] As to the comparative value of declarations made before, at the

appear to have been adverted to in all the cases which have been referred to. It is a distinction depending upon the general rules of evidence, and is unaffected by any principle peculiar to the subject of this work.[r] [168]

188. II. The cases have also decided, that if the description of the person or thing be wholly inapplicable to the subject intended, or said to be intended by it, evidence is inadmissible to prove who or what the testator really intended to describe. The Chief Justice of the Court of Common Pleas appears, indeed, in one part of the judgment in *Miller* v. *Travers*, to lay some stress upon the circumstance, that "the devise in question had a certain operation and effect, namely, the effect of passing the estate in the city of Limerick."[s] It is impossible, however, to read the

time of, or after, making the will, see [per Lord Eldon, 6 Ves. 398, and cases there cited;] *Murless* v. *Franklin*, 1 Swans. 13; N.B. *Trimmer* v. *Bayne*, 7 Ves. 508; *Langham* v. *Sandford*, 2 Mer. 23; [S.C. 19 Ves. 649;] *Conolly* v. *Lord Howe*, 5 Ves. 700; *Strode* v. *Russell*, 2 Vern. 625; *Thomas* v. *Thomas*, 6 T. R. 671; *Richardson* v. *Watson*, 4 B. & Adol. 787; *Whittaker* v. *Tatham*, 7 Bing. 628. ["Cases are referred to in the books, to show that declarations contemporaneous with the will are alone to be received; but, on examination, none of them establish such a distinction. Neither has any argument been adduced which convinces us that those subsequent to the will ought to be excluded, wherever any evidence of declarations can be received. They may have more or less weight, according to the time and circumstances under which they were made, but their admissibility depends entirely on other considerations." Per Lord Denman, C.J., in *Doe* d. *Allen* v. *Allen*, 12 Ad. & Ell. 455.]

[r] See as to this, *Hiscocks* v. *Hiscocks*, supra, pl. 183.

[s] Supra, pl. 181.

whole judgment without seeing that the grounds upon which it proceeded are wholly independent of that circumstance, and that the objections there pointed out, to the admission of extrinsic evidence *to prove intention*, would have applied with equal force whether the will had contained a devise of land in the *city* of Limerick or not. The devise of lands in the *county* of Limerick was *independent* of that in the *city* of
[164] Limerick, and the will would not have expressed more plainly than it did, an intention to devise *other* lands than those which the testator had in the *city* of Limerick, if this latter devise had been wholly omitted. Where the terms of a *single* devise can be in any way satisfied, the argument against enlarging its effect is irresistible. But, where there are two distinct devises, the fact that one of them is satisfied cannot furnish an argument for refusing to give effect to the other.

189. III. The decisions have also overruled the distinction taken in *Selwood* v. *Mildmay*[t] as to the *substance* of the thing intended being sufficiently described, and the *denomination* only mistaken; for clearly the testator in *Miller* v. *Travers* intended to devise some *real estate* besides that in the city of Limerick. This, indeed, is involved in the last observation.

190. IV. The cases of *Day* v. *Trig* and *Goodtitle* v. *Southern*, cited in the judgment in *Miller* v. *Travers*, do not touch the question of admitting extrinsic evidence

[t] Supra, pl. 131. [See *Lindgren* v. *Lindgren*, infra, page 168, note.]

to prove intention. For in those cases, after rejecting words of mere surplusage, there remained (as the Chief [165] Justice observed) a "sufficient description in the will to ascertain the thing devised."[u] The question of admitting extrinsic evidence *to prove intention* does not, therefore, arise in such cases. In cases like the latter, indeed, a question might be made whether the words referring to *the occupation of the farm* were not restrictive; and if admitted to be so, a Court would (so long as it received the instrument as the will of the testator) be bound to give effect to them.[x] But, in that particular case, the Court was of opinion, *upon the construction of the words alone*, that they were not restrictive, but mere surplusage, and that the only operative words in the devise[y] were, "all that my farm called Trogue's Farm."

191. V. In *Miller* v. *Travers*, the learned Judge said, that there were two classes of cases only to which the maxim "*Ambiguitas verborum latens verificatione suppletur*," applied, and these cases he illustrates with great exactness.[z] The learned reader, however, may [166] perhaps still consider that a class of cases, which existed before the decision in *Miller* v. *Travers*, has not been satisfactorily adjudicated upon by the decision in

[u] Supra, pl. 181, p. 143. See *Doe* d. *Smith* v. *Galloway*, 5 B. & Adol. 43.

[x] Prop. II.

[y] See per Littledale, J., in *Richardson* v. *Watson*, 4 B. & Adol. 797.

[z] Supra, pl. 181, page 139.

that case. The judgment of the Vice-Chancellor in that case, and the judgments in previous cases already referred to, had decided that a description *wholly* inapplicable to the subject intended might be corrected by evidence *proving the intention* of the testator; from which it would follow, of course, that a description *partially* correct might be aided by the same means, although such description, when taken in connection with the circumstances of the case alone, might not be sufficient to satisfy the mind of a Judge. A case, however, might easily be suggested, in which a Judge, knowing *aliunde* for whom or for what an imperfect description was intended, would discover a sufficient certainty to act upon, although, if ignorant of the intention, he would be far from finding judicial certainty in the words of the devise. The question, then, which *Miller* v. *Travers* may be considered as having left undecided, is,—whether extrinsic evidence *to prove intention* is admissible in the case of such a description as that which has just been suggested? The question arises from the high authority of the case of *Beaumont* [167] v. *Fell*,[a] which is a case in point. There was no resemblance in that case between the names of *Gertrude Yardly* and *Catherine Earnley*, except in the resemblance *in sound* between Gatty and Katy, which possibly might (as the Court ingeniously guessed) have occasioned the mistake in the will. Assuming that the Court could not, in such a case, act upon the description in the will *without first inquiring who was*

[a] Supra, pl. 143.

really intended, could such an inquiry be lawfully gone into?

192. The case of *Hiscocks* v. *Hiscocks* has decided this point also. In point of principle, it is submitted, that a description which is so imperfect as to be *useless as it stands, i. e.* useless unless it be aided *by evidence of intention,* is not distinguishable from one which is wholly incorrect.[b]

193. VI. The case of *Selwood* v. *Mildmay,*[c] as explained in *Miller* v. *Travers,*[d] proceeded upon a correct principle; but that principle, it is submitted, was altogether misapplied, and the case is one which ought not to be followed in specie. Upon this point, also, the decision in *Hiscocks* v. *Hiscocks* appears to be conclusive.[8] [168]

The case of *Beaumont* v. *Fell,* just adverted to, is one which it is extremely difficult, if not impossible, to reconcile with *Miller* v. *Travers,* unless it be upon the ground that the description of the legatee was, in the circumstances of that case, sufficient without reference to what the testator *had declared.* The difficulty in the way of this explanation is, that the case is always referred to as a leading authority for the admissibility of evidence to *prove intention* in cases in

[b] See *Smart* v. *Prujean,* 6 Ves. 565. "The rule of law is, that an instrument properly attested, in order to incorporate another instrument not attested, must describe it so as to be a manifestation of what the paper is, which is meant to be incorporated, *in such a way that the Court can be under no mistake.*" See also *Dillon* v. *Harris,* 4 Bligh, N. S. 321.

[c] Supra, pl. 131. [d] Supra, pl. 181.

[8] [*Lindgren* v. *Lindgren,* page 171.]

which the description of the *person* or *thing* intended is sufficient without the aid of such evidence. The case is pointedly noticed with disapprobation in *Hiscocks* v. *Hiscocks*.[e]

The MS. case (*supra*, pl. 146) is clearly overruled
[169] by *Miller* v. *Travers*,[f] and the two subsequent cases of *Gord* v. *Needs*, and *Hiscocks* v. *Hiscocks*.[g]

[e] Supra, pl. 183. ["It is *not* pointedly noticed with disapprobation in *Hiscocks* v. *Hiscocks*." See per Lord Brougham, in *Mostyn* v. *Mostyn*, 5 Ho. Lo. Cas. 167.]

[f] One of the learned Judges, whose opinion upon this MS. case is referred to in page 121, has since informed the writer that he now considers that opinion erroneous.

[g] [In *Lindgren* v. *Lindgren*, 9 Beav. 358, the testatrix, by her will, dated in 1843, expressed herself as follows:—"I hereby give and bequeath unto A. Lindgren £500 of the stock 3 per cent. Consols *now standing in my name* in the books of the Bank of England." This bequest was followed by five other bequests to different persons of £100 each "of the said 3 per cent. Consols," and there was a general residuary gift. Testatrix died two months after making her will, and had not at the date of such will, or at her death, any stock whatever standing in the Bank books. It appeared, however, that in 1840 she had had a sum of £1000 Consols (equivalent in amount to the aggregate of the bequests above stated) standing in her name, which she sold out, and handed over the cash to the said A. Lindgren (the plaintiff), requesting him to take charge of the same and give her interest for it to the amount which she had previously received for the actual stock. This interest the said A. Lindgren regularly paid her up to the date of her will. It was argued for the defendant, the residuary legatee, that the above-mentioned several bequests failed altogether for want of the subject purported to be bequeathed; and that extrinsic evidence was inadmissible.

Lord Langdale, M.R., said:—"I cannot assume that the testatrix meant nothing by her bequest, or that she caused it to be inserted in her will in mere mockery, meaning only to delude and disappoint the objects of a pretended bounty.

"It ought rather to be assumed that she had a rational meaning;

194. VII. The conclusion, then, which these cases appear to warrant, is, that the only cases in which

[and the real question is, whether that meaning, or the true effect of her will, can be discovered by the addition of evidence, consistently with the rules of the law.

"Upon the face of the will all is clear and free from ambiguity: whatever ambiguity there may be, it is latent. No difficulty occurs, till it appears, by evidence from without, that the testatrix had not, at the date of her will, the stock which she purported to bequeath.

"The authority principally relied on by the plaintiff and the defendants who concur with him, is the case of *Selwood* v. *Mildmay* (supra, pl. 131). In that case, the testator was possessed of certain 4 per cent. Bank Annuities. He sold the whole in February, 1792, and with the produce purchased Long Annuities. From February 1792 (the time of the sale), at the date of his will, and up to the time of his death, he held no 4 per cent. Bank Annuities. By his will, dated the 26th day of January, 1796, he gave to his wife Elizabeth the interest and proceeds of £1250, which he described to be 'part of his stock in the 4 per cent. Annuities of the Bank of England, for and during the term of her natural life, together with such dividends as should be due upon the said £1250 at the time of his decease;' and, after the decease of his wife, he gave the said stock to several of his relations, in certain shares and proportions, always calling it his 4 per cent. stock, and he disposed of the residue. There being no ambiguity on the face of the will, it was held that evidence ought to be admitted 'to prove, not that there was a mistake, for that was clear, but to show how it arose,'—'that it was clear the testator meant to give a legacy, but mistook the fund. He acted upon the idea that he had such stock.' If the testator 'had had the stock at the time, it would have been considered that the legacy was specific, and that he meant that identical stock, and any act of his destroying that subject would be a proof of *animus revocandi*; but if it was a denomination, not the identical corpus, in that case if the thing itself could not be found, and there was a mistake as to the subject out of which it was to arise, that would be rectified;' and it was declared, that the legatees of the £1250 stock were entitled to be paid their legacies out of the personal estate.

"It is very necessary to observe, that in the case of *Selwood* v.

evidence to prove intention is admissible, are those in which the description in the will is *unambiguous* in its application to each of several subjects.

[*Mildmay* the evidence was received, only for the purpose stated by the Master of the Rolls in his judgment, and not, as it has been erroneously supposed, for the purpose of showing that the testator, when he used the erroneous description of 4 per cent. stock, meant to bequeath the Long Annuities which he had purchased with the produce of the 4 per cent. stock; and that the result of the cause was, not to substitute another specific subject in the place of a specific legacy which the will purported to bequeath;—not to substitute the Long Annuities, which the testator had and did not purport to give, for the 4 per cent. Bank Annuities, which he had not and did purport to give. The absence of the fund purported to be given, showing that a specific legacy was not intended, other evidence was admitted to show how the mistake arose; and this being clearly shown, it was held, that the legatees were entitled to payment out of the general personal estate; and the decree declared, that the legatees were entitled to be paid their legacies to the amount of the Bank 4 per cent. Annuities purported to be given, and that such legacies were to be valued according to the market price the Bank 4 per cent. Annuities bore on the day of the testator's death. This was the principle of the decree; but on the allegation that the estate was not sufficient to pay the legacies in full, provision was made for their abatement and for payment of certain debts; and it was ordered that the Long Annuities should be sold, and the proceeds applied as was directed.

"The circumstances of *Selwood* v. *Mildmay* are very like those of the case now under consideration; and I think that, if that authority has not been overruled, I ought to be governed by it.

"The cases of *Miller* v. *Travers* (supra, pl. 181), and *Hiscocks* v. *Hiscocks* (supra, pl. 183), were cited, for the purpose of showing that *Selwood* v. *Mildmay* has been overruled. In the former (*Miller* v. *Travers*), the testator devised all his freehold and real estates in the county of Limerick and in the city of Limerick to trustees and their heirs. He had no real estate in the county of Limerick, but a small real estate in the city of Limerick, and considerable estates in the county of Clare. It was held, that parol evidence was not admissible, to show that the testator's intention was, that his

195. The reader need scarcely be reminded, that, consistently with the conclusion which confines the admissibility of *evidence to prove intention* to this class

[real estates in the county of Clare should pass. In the judgment, the case of *Selwood* v. *Mildmay* is mentioned, as if it had been held, that the Long Annuities which had been purchased with the 4 per cent. stock should pass, rather than that the will should be altogether inoperative, which appears to have been a mistake. The false description was rejected, and the legacies, as I have stated, were held to be payable, not by a substitution of the Long Annuities, but out of the general personal estate, of which the Long Annuities were part. No evidence was admitted for the purpose of showing, that the testator meant specifically to bequeath the Long Annuities, when he used the description of 4 per cent stock. The case of *Miller* v. *Travers* does not therefore appear to me to be inconsistent with *Selwood* v. *Mildmay*.

"In *Hiscocks* v. *Hiscocks*, the testator devised to his son John Hiscocks for life, remainder to John his eldest son for life, remainder over. At the date of the will, John Hiscocks, the son, the first devisee for life, had been twice married; he had one son, Simon, by his first wife, and by his second wife an eldest son, John. Evidence of the instructions given by the testator for his will, and declarations of his intentions, were not admitted to prove which of the two grandsons was meant. In this case, *Selwood* v. *Mildmay* is noticed as having been doubted in *Miller* v. *Travers*. The erroneous view of it which appears to have been taken is not noticed; and, when it is remarked that evidence of instructions for the will was received, it is not observed that it was only admitted as part of the evidence to show how the mistake was made, *i. e.* for the purpose of showing that the erroneous description was copied from a former will. Under these circumstances, I do not think that the case of *Selwood* v. *Mildmay* is overruled by the cases of *Miller* v. *Travers* and *Hiscocks* v. *Hiscocks*; and, considering myself to be bound by the authority, I shall make a similar decree, declaring that the several legatees are entitled to their several legacies, to the amount of £1000 Bank 3 per cent. Annuities; and that such legacies are to be valued according to the market price the 3 per cent. Bank Annuities bore on the day of the testatrix's death."

In the above case, there was nothing in the context from which

of cases, a testator's *declarations* may be admissible in other cases also. They will be so in those cases in which such declarations, according to the general rules of evidence, prove or tend to prove a material fact,

[it was apparent that the testatrix had used the words in which she assumed to describe the subject of her bequest, in any other than their strict and primary meaning. But the words so construed were insensible with reference to extrinsic circumstances, and the Court therefore properly directed an inquiry, with the view, if possible, of applying the words in some secondary sense.

Now, it may safely be conceded, that when the extrinsic circumstances of the case, as found by the Master, were once within the knowledge of the Court, there remained no moral doubt as to the intention of the testatrix, with respect to the disputed bequest. But that, surely, was not enough. "In expounding a will, the Court is to ascertain, *not what the testator actually intended*, as contradistinguished from what his words express, *but, what is the meaning of the words he has used.*" (Per Parke, J., vide supra, pl. 9, note [1].) The office of extrinsic evidence, in cases of this nature, is not merely to enable the Court to form a plausible or probable conjecture as to what the testator may have intended by the words which he has employed; it is rather, to ascertain whether, when all the facts of the case are known, such words, however inexact and improper, do really, with sufficient legal certainty, apply to and describe the alleged object or subject-matter of the disposition. In this case it is submitted that they did not. The Court had to deal with a specific bequest of a non-existing chattel; and however embarrassing the reflection, that the testatrix must have meant something by her bequest, it seems clear that the words of her will, aided by a full knowledge of the circumstances under which it was written, were inadequate to convey that meaning to a Court of construction, through the strait and jealously-guarded avenues provided by the rules of evidence. It must be recollected that in all cases of actual *mistake*, as distinguished from those of mere *falsa demonstratio*, the Court has no means whatever of ascertaining what the testator would have done, had his attention been drawn to the fact. His motives and intentions, which were always secret, became at his death for ever undiscoverable; and the most plausible hypothesis as

collateral to the question of intention;[g] which fact (within the scope of the Propositions stated in the preceding pages) would aid the mere exposition of the testator's words.

[to the manner in which he might have rectified his error, is at best mere matter of curiosity and conjecture.

Finally, upon this point the experience of Lord Langdale may be borne in mind. "I have known," said his Lordship, "several cases in which testators have, on the face of their wills, made great gifts with nothing to answer them; and I have heard Lord Eldon say that the easiest method of practising a delusion on others is by the mode of framing a will." *Quennell* v. *Turner*, 13 Beav. 249.]

[g] Supra, pl. 104.

[170] OF LATENT AND PATENT AMBIGUITIES.

196. THE rule of law, an elucidation of which has been attempted in the preceding pages, is commonly expressed by Lord Bacon's well-known maxim (*Regula* 23), "*Ambiguitas verborum latens verificatione suppletur; nam quod ex facto oritur ambiguum verificatione facti tollitur.*"

197. Upon this maxim, Lord Bacon observes:—

"There be two sorts of ambiguities of words: the one is *ambiguitas patens*, and the other *latens*. *Patens* is that which appears to be ambiguous upon the deed or instrument; *latens* is that which seemeth certain, and without ambiguity, for anything that appeareth upon the deed or instrument; but there is some collateral matter out of the deed that breedeth the ambiguity.

"*Ambiguitas patens* is never holpen by averment, and the reason is, because the law will not couple and mingle matter of specialty, which is of the higher account, with matter of averment, which is of inferior account in law; for that were to make all deeds hollow,
[171] and subject to averments, and so, in effect, that to pass without deed, which the law appointeth shall not pass but by deed.

"Therefore, if a man give land to J. D. *et* J. S., *et hæredibus*, and do not limit to whether of their heirs, it shall not be supplied by averment to whether of them the intention was the inheritance should be limited.

"So, if a man give land in tail, though it be by will, the remainder in tail, and add a *proviso* in this manner: Provided, that if he, or they, or any of them, do any, etc., according to the usual clauses of perpetuities, it cannot be averred upon the ambiguities of the reference of this clause, that the intent of the devisor was, that the restraint should go only to him in the remainder, and the heirs of his body; and that the tenant in tail in possession was meant to be at large.

"Of these, infinite cases might be put, for it holdeth generally, that all ambiguity of words by matter within the deed, and not out of the deed, shall be holpen by construction, or in some case by election, but never by averment, but rather shall make the deed void for uncertainty.

"But if it be *ambiguitas latens*, then otherwise it is: as, if I grant my manor of S. to J. F. and his heirs, here appeareth no ambiguity at all; but if the truth be, that I have the manors both of South S. and [172] North S., this ambiguity is matter in fact; and, therefore, it shall be holpen by averment, whether of them was that the party intended should pass.

"So, if I set forth my land by quantity, then it shall be supplied by election, and not averment.

"As, if I grant ten acres of wood in Sale, where I

have a hundred acres, whether I say it in my deed or no, that I grant out of my hundred acres, yet here shall be an election in the grantee, which ten he will take.

"And the reason is plain, for the presumption of the law is, where the thing is only nominated by quantity, that the parties had indifferent intentions which should be taken, and there being no cause to help the uncertainty by intention, it shall be holpen by election.

"But in the former case the difference holdeth, where it is expressed, and where not; for if I recite, whereas I am seized of the manor of North S. and South S., I lease unto you *unum manerium de* S.—there it is clearly an election. So, if I recite, where I have two tenements in St. Dunstan's, I lease unto you *unum tenementum*,—there it is an election, not averment of intention, except the intent were of an election, which may be specially averred.

[173] "Another sort of *ambiguitas latens*[h] is correlative unto these; for this ambiguity spoken of before is when one name and appellation doth denominate divers things; and the second, when the same thing is called by divers names.

"As, if I give lands to Christ Church in Oxford, and the name of the corporation is *Ecclesia Christi in Universitate Oxford*, this shall be holpen by averment,

[h] Can the word "ambiguity," as used in this place, be understood —in its proper sense—as importing *uncertainty?* What uncertainty can arise from the omission of an *alias*, provided the subject is called by one of its proper names? "Ambiguous—Doubtful; having two meanings; of uncertain signification."—*Johnson.*

because there appears no ambiguity in the words; for this variance is a matter in fact: but the averment shall not be of intention, because it doth stand with the words.

"For, in the case of equivocation, the general intent includes both the special, and therefore stands with the words: but so it is not in variance, and therefore the averment must be of matter that do endure quantity, and not intention.

"As to say, of the precinct of Oxford, and of the University of Oxford, is one and the same, and not to say that the intention of the parties was, that the grant [174] should be to Christ Church in that University of Oxford."

198. The only point which remains to be considered is,—How far the Propositions stated above are consistent with Lord Bacon's Maxims.

199. The attention of the reader must, in this place, be recalled to the proper meaning of the term *ambiguity*, as applied to the subject of these observations.[1]

200. A written instrument is not ambiguous because an ignorant and uninformed person is unable to interpret it. It is ambiguous only, if found to be of uncertain meaning when persons of competent skill and information are unable to do so.

201. Words cannot be ambiguous, because they are unintelligible to a man who cannot read; nor can they be ambiguous, merely because the Court which

[1] Supra, pl. 96.

is called upon to explain them may be ignorant of a particular fact, art, or science, which was familiar to the person who used the words, and a knowledge of which is therefore necessary to a right understanding of the words he has used. If this be not a just conclusion, it must follow—that the question, whether a
[175] will is ambiguous, might be dependent, not upon the propriety of the language the testator has used, but upon the degree of knowledge, general or even local, which a particular Judge might happen to possess; nay, the technical precision and accuracy of a scientific man might occasion his intestacy,—a proposition too absurd for an argument. It follows, therefore, that a Judge is not in a situation to say whether a testator's will is ambiguous or not until he has first applied to it the extrinsic evidence to which the Fourth Proposition[k] refers.

202. Again, a distinction before adverted to,[l] but not noticed in any of the reported cases, must be taken between *inaccuracy* and *ambiguity* of language.

203. Language may be inaccurate without being ambiguous, and it may be ambiguous although perfectly accurate. If, for instance, a testator having one *leasehold* house in a given place, and no other house, were to devise his *freehold* house there to A. B., the description, though inaccurate, would occasion no ambiguity. If, however, a testator were to devise an estate to John Baker, of Dale, the son of Thomas, and there were two persons to whom the entire description accurately applied, this description, though

[k] Supra, pl. 56. [l] Supra, pl. 96.

accurate, would be ambiguous. It is obvious, therefore, [176] that the whole of that class of cases in which an inaccurate description is found to be sufficient merely by the rejection of words of surplusage are cases in which no ambiguity really exists. The meaning is certain, notwithstanding the inaccuracy of the testator's language. A Judge in such cases may hesitate long before he comes to a conclusion; but if he is able to come to a conclusion *at last*, with no other assistance than the light derived from a knowledge of those circumstances to which the words of the will expressly or tacitly refer, he does in effect declare, that the words have a legal certainty,—a declaration which of course excludes the existence of any ambiguity. The language may be inaccurate; but if the Court can determine the meaning of this inaccurate language, without any other guide than a knowledge of the simple facts, upon which—from the very nature of language in general—its meaning depends, the language, though inaccurate, cannot be ambiguous. *It follows that, in all cases, the application of the extrinsic evidence, to which the Fifth Proposition refers, must precede any declaration which a Court can have a right to make that a will is ambiguous.*[m]

204. The circumstance, that the inaccuracy is ap- [177] parent upon the face of the instrument, cannot, in principle, alter the case.

205. With the distinctions just adverted to in his

[m] Supra, pl. 96.

mind, the reader will have no difficulty in following the writer through the few remaining observations on the subject of latent and patent ambiguities.

206. It has been shown, in the preceding pages, that evidence of two descriptions has, under circumstances, been held admissible in aid of the exposition of wills, namely:—1. Explanatory Evidence, consisting of evidence of collateral facts and circumstances only. 2. Evidence to prove Intention as an independent fact.[n]

207. Now, Courts of law, in admitting evidence of the first description, have professed to save whole Lord Bacon's Rule, and must therefore have considered that the admission of such evidence was consistent with the Rule. There is no reason for questioning the soundness of the judgment which led to such a conclusion. The strictest interpretation of which the Rule is capable cannot be stated higher than this,—
[178] that Courts of law, in expounding a written instrument, are precluded from giving to the instrument any effect which it does not express; and if it be conceded that the admission of evidence of the first description is strictly consistent with the office of simply ascertaining what the instrument itself expresses, Lord Bacon's Rule is untouched by admitting it. Indeed, it is deserving of consideration, whether the language of the Rule does not tacitly concede the admissibility of such evidence. Lord Bacon, in his concluding paragraphs, expressly points at the distinction between evidence of

[n] Supra, pl. 10.

matters collateral to the intention, and evidence of the intention itself; and the maxim, in speaking of ambiguities which arise "*ex facto*," necessarily supposes the language of the will, and the facts with reference to which it was written, to have been collated together. It is the incongruity or want of correspondence between the language and the facts which raises a *latent* ambiguity in the common acceptation of the term.

208. It may be asked, however, whether the Rule is not violated, when evidence of the first kind is admitted in aid of a description which *upon the face of the will* is inaccurate or imperfect? With confidence it is answered—No. The inaccuracy of the testator's language in such cases is undoubtedly *patent;* but as the meaning of inaccurate language *may* be unambi- [179] guous, it is impossible to predicate of a will in such cases, or in any case, that it is ambiguous, until the effect of bringing the language into contact with the facts to which it refers shall first have been tried. See the case of *Goblet* v. *Beechey*.[o] The word "mod," as used by Nollekens, in the 11th codicil to his will, was a patent inaccuracy; but the Court, upon further directions—with no guide to the testator's intention but his words, and the knowledge which is common to every working sculptor in the country—decided that the testator's models were sufficiently described by the word,—a decision which negatived the existence of any ambiguity whatever.[p] The reversal of the Vice-Chan-

[o] Appendix, No. I. [p] Supra, pl. 96.

cellor's judgment in that case does not affect this point.

209. To what class of cases, then, does Lord Bacon refer, in speaking of patent ambiguities? Let his own commentary upon the rule answer for him. The examples by which he illustrates that part of the rule, which relates to patent ambiguities, are not cases of misdescription of the object of the testator's bounty, or of the subjects of disposition, but cases in which (the
[180] persons and things being sufficiently described) the testator's general intention with respect to them is ambiguously expressed.[q] Such cases are within the Sixth Proposition above stated, and are not saved by the exceptions contained in the Seventh Proposition. A devise to one of the sons of A., who hath several sons, is a case within the same principle.[r] No person in particular is *intended* by the will.

210. So far the maxim and the authorities referred to in the preceding pages appear to stand together. But, what is there in the maxim which ever authorized the admission of evidence of intention where the language of the will was wholly inapplicable, or of uncertain application, to any subject? In the first place, can such a will be properly termed ambiguous? An instrument, the words of which are sensible in more senses than one, is, properly speaking, an *ambiguous*

[q] The points of inquiry under a will may, for general purposes, be classed under three heads:—1. The person intended.—2. The thing intended.—And 3. The intention of the testator with respect to each of them.

[r] 2 Vern. 625.

instrument. But an instrument which points at no certain intention is (in the language of the Courts) *insensible*, and not merely ambiguous. Admitting, however, that such a will as we are now supposing is an ambiguous will within the meaning of the maxim, the question whether the maxim authorizes its admission in such cases will still recur. The words of the maxim are, undoubtedly, very general; but the examples by which it is illustrated are not so. The examples given by Lord Bacon, in which evidence to prove intention is said to be admissible to remove or explain a latent ambiguity, are cases in which the language of the will *includes and describes the subject intended* by the testator, and is ambiguous, only because it describes and is equally applicable to *more than one subject*. It may admit of argument, whether the commentary on the maxim does not justify the admission of evidence to prove intention even in such cases upon that specific ground. The observation—"For, in the case of equivocation, the general intent includes both the special, *and therefore stands with the words, but so it is not in variance*"—may, without violence to the language of the commentary, be considered as applicable to all the cases of latent ambiguity, which are put in illustration of the maxim.[s] Can the practice, then, of admitting evidence of intention in cases in which the description of the person or thing is inapplicable, or of uncertain application, to any subject, be considered a sound exposition of Lord Bacon's Rule, seeing that the practice

[181] [182]

[s] See *Hiscocks* v. *Hiscocks*, supra, pl. 183.

has carried the force of his general expressions—beyond the examples by which he has illustrated his meaning—to cases not in the same predicament? The decisions in *Miller* v. *Travers* on appeal, and in *Hiscocks* v. *Hiscocks*, have, it is hoped, set this important point at rest.

GENERAL CONCLUSIONS. [183]

211. The conclusions, then, which the preceding pages appear to authorize, are these:—

212. I. That evidence of material facts is, in all cases, admissible in aid of the exposition of a will.

213. II. That the legitimate purposes to which—in succession—such evidence is applicable, are two: namely, first, to determine whether the words of the will, with reference to the facts, admit of being construed in their primary sense; and, secondly, if the facts of the case exclude the primary meaning of the words, to determine whether the intention of the testator is certain in any other sense, of which the words, with reference to the facts, are capable.—And,

214. III. That intention cannot be averred in support of a will, except in the special cases which are stated under the Seventh Proposition. [184]

215. The writer of this Examination, then, whilst he admits and insists upon the rule stated in an early page[a]—"That the judgment of a Court in expound-

[a] Supra, pl. 5.

ing a will should be simply *declaratory* of what is *in* the instrument,"—hopes that he may, in this place, without fear of correction, add that—consistently with that rule—

I. Every claimant under a will has a right to require that a Court of construction, in the execution of its office, shall—by means of extrinsic evidence—place itself in the situation of the testator, the meaning of whose language it is called upon to declare.[b] And that,

II. The only cases in which evidence to prove intention is admissible, are those in which the description in the will is *unambiguous* in its application to each of several subjects.

[b] Supra, pl. 26.

APPENDIX. [185]

No. I.

GOBLET *v.* BEECHEY.[a]

JOSEPH NOLLEKENS, the sculptor, made his will, and fourteen codicils thereto.

By his will, dated the 21st of March, 1818, after giving several pecuniary, and some specific legacies, he gave to Sebastian Gahagan, Alexander Goblet (the plaintiff), and George Lupton, described as three of his workmen, £100 each, to be paid as soon as convenient after his death; and to George Gahagan, another of his workmen, £20, to be paid in like manner; and to Louisa Goblet, a daughter of the plaintiff, £30. The will then proceeded as follows:—"I desire my collection of virtu in antiques, marbles, busts, models, printed books, prints, and drawings (except such books and prints as I have hereinbefore given), be sold by public auction; and that the said Alexander Goblet be em- [186] ployed to arrange, repair, and clean my said marbles, busts, and models, to fit them for sale, under the direction of my said executors; and that the said Alexander Goblet be paid for his trouble, at the rate of one guinea a day, during such time as he shall be engaged, and which I suppose will be effected in three or four days: and I desire that my said antiques, marbles, busts, and models, books, prints, and drawings, be sold by Mr. Christie, of Pall Mall. I give to

[a] See S. C., 3 Sim. 24.

Francis Douce, Esq., and to the Rev. Edward Balme, the executors of this my will, the sum of £500 each, as an acknowledgment for their trouble." In a subsequent part of the will was the following passage:—"And as to my property in the funds, in the Bank of England, the moneys to arise by the sales hereinbefore directed, the debts that shall be owing to me at my decease, and all other the residue of my estate and effects whatsoever, I give the same to Mr. Francis Russell Palmer, of Cumberland Place, New Road, and the said Francis Douce, and the Rev. Edward Balme, equally to be divided between them; and I appoint the said Francis Douce and the Rev. Edward Balme, executors of this my will."

By the 5th codicil, dated the 29th of January, 1819, the testator, after declaring that he had revoked the aforesaid residuary bequest, in lieu and stead thereof, gave and bequeathed the said property in the funds, in the Bank of England, the moneys to arise by the aforesaid sales, the debts that should be owing to him at his decease, and all other the residue of his estate and effects whatsoever, unto the said Francis Russell Palmer, the defendant Francis
[187] Douce, the Rev. Edward Balme, and the Rev. Thomas Kerrick, equally to be divided between them.

By the 6th codicil, dated the 15th of April, 1819, the testator revoked the legacy of £100 given by his will to the plaintiff, and gave him, in lieu of such legacy, an annuity of £30 for his life.

The 8th codicil, dated the 7th of February, 1820, was as follows:—"Whereas, by a former memorandum, I had directed that the marble in the yards, and the working tools in the study, should be equally divided, and one-half given to Mr. Alexander Goblet; I do hereby revoke such former direction, and, instead thereof, do hereby will and direct that the whole of the said marble, and all the working tools

in the study, be delivered by my executors to the said Alexander Goblet, for his sole use and benefit, in consideration of his care and attention to me. And whereas, in the aforesaid memorandum, I had directed my books, drawings, and prints, should be sold by auction, by Mr. King, I do hereby direct that they be sold by Mr. Evans, of Pall Mall. February 7, 1820. Joseph Nollekens."

In the 9th codicil, the testator made mention of Henry Goblet, a son of the plaintiff.

The 10th codicil, dated the 14th of August, 1820, and written immediately following the 9th codicil, was as follows:—"All the working tools in the shop I give to his father, with the marble in the yard, and the boards and utensils for working the jack I lent to Supto above a year ago, he *out* to *retern* it, I have paid and for what. J. Nollekens, this 14th of August, 1820."

The 11th codicil was in the testator's own handwriting, [188] except the attestation thereof by the subscribing witness, Mary Holt, and was as follows:—"This 28th day of January, 1822. Memorandum, that, in case of my death, all the marble in the yard, the tools in the shop, bankers, *mod*[b] tools for carving, the rasp in the draw, with [nevre

[b] In the original codicil, the word "mod" was at the end of a line, and was followed by a small mark, the purport of which appears to have been equivocal. The plaintiff contended that the mark was the letter "S," and that the word or letters "mod," with the mark, was an abbreviation of a complete word "models." It was contended, on the part of the defendants, that the mark was a hyphen, and that the word or letters "mod" was an integral part of an unfinished word; or that the disputed mark was intended for the letter "g," as mentioned in the answer of the defendant Douce. Much argument (as the writer is informed) proceeded upon this distinction, when the cause was heard upon the exceptions to the Master's report. The witnesses in the cause, and Mr. Caley, who was called by the Master, do not appear to have determined what the mark was. Mr. Garrard, however, who was also called by the Master, appears to have considered and treated the mark as the letter "S." In the statement of the case in the above report, the word is called indiscriminately "mod."

[191] The defendant, Douce, by his answer, *inter alia*, stated, that, amongst the estate and effects of the testator, Joseph Nollekens, at the time of his death, were certain very valuable models of various descriptions, used, or intended to be used, if occasion required, for the purposes of and belonging to the business of a sculptor; but which models were, many of them, of themselves rare and valuable specimens of art, and, as such, very desirable and of great worth for the cabinets and collections of persons of taste, and collectors of works of art of such nature and kind, and so esteemed by the testator himself. He further said, he believed that such models were occasionally, and when necessary or convenient, used by the testator in his lifetime for the purposes of sculpture, and in his study and practice of that art; and were also kept and preserved by him as being, of themselves, intrinsically very rare and curious works of art, and of great value to all lovers of the fine arts, or of that particular branch thereof.

The answer admitted the sale of the models, and the receipt by Douce and his two co-executors of the money produced by such sale, and that no part thereof had been paid to the plaintiff.

The defendant, by his answer, insisted, that, according to the true construction of the will and codicils, the plaintiff was not entitled to the models, and that the word "mod," in the 11th codicil, was incapable, either abstracted or by connection with other parts of that codicil, of being applied to the models claimed by the plaintiff, or to any other models.

The answer then insisted, that, from the context of the
[192] will and codicils, the testator meant to use the word "modelling," and that he omitted by mistake to repeat, or insert twice instead of once, the word "tools," in which case the expression would have been "modelling tools, tools for

carving;" and which the defendant believed the testator intended to express, but which he failed to do, from being at that time under a paralytic affection.

The answer further stated, that the testator, for some time before, and particularly about the month of January, 1822, and from thence up to the time of his death, had great difficulty or thickness in his enunciation or manner of speaking, whereby it was frequently very difficult, if not impossible, to understand him distinctly or correctly when he spoke; and that, if any communication, as in the bill mentioned, took place between the testator and Mary Holt respecting the 11th codicil (but which the answer did not admit), it was probable that Mary Holt might have misunderstood what the testator said, and that he might have attempted to pronounce in explanation the word "moulds," a great number of which were in his possession, and were not by him specifically disposed of.

The answer then insisted, that the 11th codicil must be construed by a reference to, and consideration of, the contents of the instrument, and of the will, and of the other codicils thereto; and that the principal case was not one in which any evidence could be received of parol declarations of the testator as to what he meant.

The other defendants, by their several answers, submitted the point in question to the judgment of the Court.

Witnesses were examined on the part of the plaintiff. [193]

It was proved that the plaintiff had been in the service of the testator thirty years, and was held in great estimation by him.

Charles Rossi, a sculptor, deposed, that there were not such tools as "modelling tools for carving," and that there was not any sense or meaning in such tools as "modelling tools for carving;" that tools for carving were not used

for modelling, except that, when the model was moulded and cast in plaster, carving tools were used, but that tools for modelling were not used for carving; that tools for modelling were made of bone and wood, and sometimes of steel, and sometimes of brass; and that tools for carving were made of steel.

The same witness deposed, that in his opinion any sculptor would, by the word "mod," as used in the 11th codicil, understand that the testator meant "models;" and that he, the deponent, was of that opinion; and that having regard to the language of the 11th codicil, and to the nature of the business and description of utensils and specific articles belonging to the testator as a sculptor, there was not, in the deponent's opinion, more than one thing that the word "mod," as used in the 11th codicil, could signify, and that was "models."

Peter Rouw and Edward Hodges Bailey, both sculptors, gave evidence to the same effect as Charles Rossi.

Mary Holt deposed, that she was in the service of the testator from March, 1802, to January, 1807, when she married, and again from the month of August, 1820, when
[194] her husband died, up to the testator's death, she having returned to him at his particular desire, to attend on him in his infirmity.

She then deposed, that one day, in the month of January, 1821, or 1822 (but which of those years she did not then recollect), and, on the occasion of the witness going into the room in which the testator was sitting in his dwelling-house in Mortimer-street, he being then alone, with the 11th codicil before him (and which appeared to have been just then written), asked her to witness the same, upon which she asked his permission to read it; and the testator having assented to the witness's request, she did read it aloud to, and in the hearing of, the testator; and

the testator heard the same when read over; and she so read it immediately previous to her signing the same as a witness thereto.

She further deposed, that, at the time of reading the 11th codicil to the testator, and when she had read as far as the word "bankers," she asked the testator what he meant by the word "mod," being the word next following the word "bankers," in the 11th codicil; and that, in answer thereto, the testator pronounced the word "models;" and that she then asked the testator whether he meant Goblet (meaning the plaintiff in the cause) to have the models; and that, in answer thereto, the testator said "yes;" and that she then said "bravo," thereby meaning to express her satisfaction at the testator intending that the plaintiff should have the models alluded to by the testator; and that the testator then folded the 11th codicil up, and put the same into his pocket-book.

The cause came on to be heard in Trinity Term, 1826.

Mr. Shadwell and Mr. Sidebottom for the plaintiff. [195]

Mr. Sugden, Mr. Joseph Martin, and Mr. Jacob for the defendants.

The cases cited were, *Hunt* v. *Hort*, 3 Bro. C. C. 311; *Price* v. *Page*, 4 Ves. 680; *Abbot* v. *Massie*, 3 Ves. 148; *Mohun* v. *Mohun*, 1 Swans. 201; *Andrews* v. *Dobson*, 1 Cox, 425; *Parsons* v. *Parsons*, 1 Ves. jun. 266; *Baylis* v. *The Attorney-General*, 2 Atk. 239; *Edge* v. *Salisbury*, Amb. 70; *Ulrich* v. *Litchfield*, 2 Atk. 372; *Dowset* v. *Sweet*, Amb. 175; *Careless* v. *Careless*, 1 Mer. 384; *S. C.* 19 Ves. 601; *Masters* v. *Masters*, 1 P. Wms. 421; *Norman* v. *Morrell*, 4 Ves. 769; *Kelly* v. *Powlett*, Amb. 605; *Brown* v. *Selwin*, Ca. tem. Tal. 240; *Fonnereau* v. *Poyntz*, 1 Bro. C. C.

The Vice-Chancellor (Sir John Leach) said, that the case

was not then ripe for decision, as it did not clearly appear what the letters were which formed the word "mod." He added, that he found no authority which exactly governed the case; but that, upon principle, he was satisfied, that, to admit the evidence of Mary Holt respecting the testator's declarations, would be to repeal the Statute of Frauds. He, therefore, rejected her evidence; and, upon hearing the codicil to the will of the testator, dated the 28th January, 1822, and the proofs taken in the cause, except the depositions of Mary Holt, read, he ordered, that it be referred to the Master, to inquire and state to the Court, what the testator intended by the word between the word "bankers" and the word "tools," and the two words between the words "with" and "and," in the codicil to his will dated the
[196] 28th of January, 1822. And the Master was to be at liberty to call to his assistance persons skilled in the art of writing, and also persons who had a competent knowledge of tools and articles used in statuary. And it was ordered that the consideration of all further directions, and of the costs of the suit, be reserved until after the Master should have made his report. And any of the parties were to be at liberty to apply as there should be occasion. *Reg. Lib. A.* 1825, *fol.* 1846.

The Master, by his Report, bearing date the 23rd of June, 1827, certified, that he had been attended by the solicitors for the respective parties, plaintiff and defendants, and, in their presence, had proceeded to make the inquiry directed by the decree. And a state of facts had been laid before him on the part of the plaintiff, and another state of facts on the part of the defendant Douce, and the probate of the will and codicils of the testator, and the original codicil of the 28th January, 1822, and office copies of the depositions of witnesses examined on the part of the plain-

tiff in the cause (except such parts thereof as were held by the Court to be inadmissible) had been produced and read before him: and he found thereby that the testator, Joseph Nollekens, was an excellent sculptor, resident in Mortimer Street, Cavendish Square; and that, about the year 1791, having occasion for an assistant in his business, he wrote to Mr. Clarisseau, an architect, resident in Paris, to recommend him a young Frenchman as a carver; and, in consequence thereof, the plaintiff, who was then in the employ of the sculptor to the King of France (Louis XVI.), was sent over by the said Mr. Clarisseau to this country, [197] to the testator, into his employ or service. And he further found that the plaintiff continued from that period, that is, in the year 1791, in the employ or service of the testator, until the testator's death, which happened on the 23rd of April, 1823, and during that period was employed by the testator on many of his best works, chiefly as a carver, but frequently as a modeller, and acquired the esteem and confidence of the testator in a very great degree, insomuch, that for years previous to the testator's death, the plaintiff almost wholly resided in the testator's house with him, on a footing of great trust and confidence. And he further found, that, for some considerable time previous to his death, the testator was seized with a paralytic affection in his limbs, which deprived him of the use of his limbs, and confined him to the house; and that during the latter period, the plaintiff superintended the business of the testator, and gave great and unremitted attention to the same.

The Master, by his Report, further found, that the "bankers" mentioned in the 11th codicil, were solid pieces of wood, in which were placed blocks of marble when about to be worked; and that the bankers belonging to the testator, and also his tools for carving, and the rasp mentioned

in the 11th codicil, were all matters of small and trifling value; but the models belonging to the testator, at the respective times of making his 11th codicil and of his death, were of great value, (that is to say), of the value of £700 and upwards.

[198] The Master further stated, that he had availed himself of the liberty given by the decree, of calling to his assistance Mr. John Caley, a person skilled in the art of writing, and also that of Mr. Charles Garrard, of Brompton, sculptor and statuary, a person of competent knowledge of the tools and articles used in statuary: and that the said Mr. Caley, having examined the original codicil of the 28th of January, 1822, had made a transcript thereof, according to his judgment of the characters, a true copy of which was set forth in the first schedule to his report; and that the said Mr. Caley had personally attended the Master, and declared he could form no judgment of what was intended by the word "mod." And the Master further stated, that the said Mr. Garrard had also examined the said original codicil of the 28th of January, 1822, and had made a report, not only as to the word "mod," which he understood to be a contraction of the word "models," but as to the other two words, respecting which he was directed by the decree to inquire, and as to the proper reading of the codicil at large; and doubts having arisen as to the things intended by the word "models," supposing that to be the true reading of the contraction, the said Mr. Garrard had further, at the Master's request, explained the technical meaning of the word "models," as he, from his knowledge of sculpture and statuary, understood the same; and the Master set forth a copy of Mr. Garrard's report, in the second schedule to his (the Master's) report.

The Master then certified, as the opinion which he had formed, with such assistance as aforesaid, that the word in-

tended by the testator by the word or contraction between [199]
the word "bankers" and the word "tools" was "models;" and that the things intended by him thereby were such articles as were described by Mr. Garrard in his report to fall within the meaning of that term in its ordinary uses by sculptors. And he was further of opinion, that, by the two words between the words "draw" and "and" in the 11th codicil, the testator intended "with the apron," according to the reading or interpretation of Mr. Garrard, which appeared to him satisfactory, for the reasons assigned by Mr. Garrard in his report.

Mr. Garrard, by his report, which was referred to by the Master, after explaining the word "bankers," in the 11th codicil, to mean certain massive heavy benches used for the purpose of carving blocks of marble upon, added, that the first and only construction he could put upon the contracted word "mod^{s}," or upon the testator's intention when writing that word, was, that it meant "models;" that the testator intended to write models, and meant what he had written to be taken for and understood to be models, that is (according to the idea a sculptor annexes to the term), original material representations of forms, either existing in nature, or ideal.

The rest of Mr. Garrard's report related to the interpretation of parts of the codicil subsequent to the word "mod."

The defendant Douce excepted to the Master's report, on the ground that he ought to have stated and certified by his report, that he had been unable to discover or ascertain in any manner, and therefore could not state to the Court, what was intended by the testator by the word between the [200]
word "bankers" and the word "tools."

The cause came on to be heard in the matter of the exception, and on further directions, in Hilary Term, 1829, before the Vice-Chancellor (Sir Lancelot Shadwell), when

his Honour overruled the exception—confirmed the Master's report—and declared that the plaintiff was entitled to the models, or the money produced by the sale of them; and ordered that the same, together with the costs of all parties, should be paid out of the testator's estate.—*Reg. Lib. A.* 1828, *fol.* 1633.

The decree, on further directions, was reversed on appeal by Lord Chancellor Brougham.—*Reg. Lib.*[10]

[10] [His Lordship's judgment was as follows :—" The testator, who had previously by his will, and in express terms, disposed of his models at the time when he was disposing of all the rest of his collection, by a subsequent codicil, being the 11th to that will, in a very unintelligible enumeration of articles, coupling them with tools, bankers, and marble in the yard, introduces the word 'mod.' with what seems, and may be supposed to be, a hyphen, a point, a blot, or a small *s* affixed; and the present question is as to the meaning of that word. The Master called to his assistance Mr. Caley, a gentleman skilled in writing, and also Mr. Garrard, who is said to be an eminent statuary, and he has adopted the opinion of Mr. Garrard as to the writing, instead of that of Mr. Caley, and found that the word 'mod.' was a contraction for 'models.'

Now, if I am to be bound by the evidence, the opinion of Mr. Caley is at least as good as that of Mr. Garrard. Although the former professed himself unable to form any opinion as to what word was meant to be expressed by the characters in question, he thought there was no *s* affixed. But in what company is the word 'mod.' found to occur? It is found, not among articles of value, but thrown in among the tools in the shop, bankers (which are great benches), the rasp, and something which is supposed to mean the testator's apron. It is, to say the least of it, singular that the testator should have introduced his models, which were of very considerable value, and were the very apple of his eye, among such an assortment. That is one reason. Another is, that the word 'models,' which occurs at full length in the will, would upon this construction be done away with, and that without any direct words of revocation, such as are found in the other codicils, where revocation was plainly the testator's object, and without any certainty as to what he really intended. He would thus by a doubtful, or rather by a half-word, revoke that which he had previously disposed of in formal terms. I have great doubts whether, if this were the case of a will of real property, in which the testator had made a formal devise of all his

No. II.

ATTORNEY-GENERAL *v.* GROTE.[c]

"I HAVE repeatedly and very often given my attention to this case. I have no hesitation to state, that I have often changed my opinion upon it. To state that I have never been able, to my own satisfaction, to reconcile the decisions to be found in the books upon cases which involved similar questions, is only to repeat what I often stated in Court. [201] The difficulties in this case are probably increased by a Judge's being obliged to take the will and codicil as they are to be found in the probate, when, it is very probable, that their contents, when the testator made them, might influence the construction of such parts as must now be taken to be the whole of the will and codicil.

"I think there is evidence upon the face of the will, that the testatrix meant the legacies which she connects with the word 'stock,' to the legacies of stock which she had. She uses the expression, 'further parts of my stock;' I conceive she means to give what she has.

"The question is, whether she meant, where she gives £100 Long Annuities stock, the same as if she had given £100 per annum Long Annuities. It is difficult to get rid of a strong impression which the repeated variation of the

[estates, and afterwards in a codicil, had introduced the letters 'est' in the middle of a gift of his pictures, books, cash at his bankers, furniture, etc., the codicil would be effectual to carry the estates previously given. It would be most dangerous to allow it to operate as a revocation of a previous devise, which had been solemnly made.

Upon these grounds I am of opinion that the exception must be allowed. 2 Russ. & Myl. 624.]

[c] The Author is indebted to his friend Mr. G. Richards for the above note of Lord Eldon's, taken from a MS. note in his Lordship's hand-writing. [See 2 Russ & Myl. 699.]

terms, 'Gifts of £100. per annum Bank Long Annuities,' and of the terms, '£100. Long Annuities stock,' to be found in this will, creates in the mind of a person reading the will. It is difficult to conceive that the testatrix really meant the same thing in both cases. But individual belief ought not to govern the case,—it must be judicial persuasion.

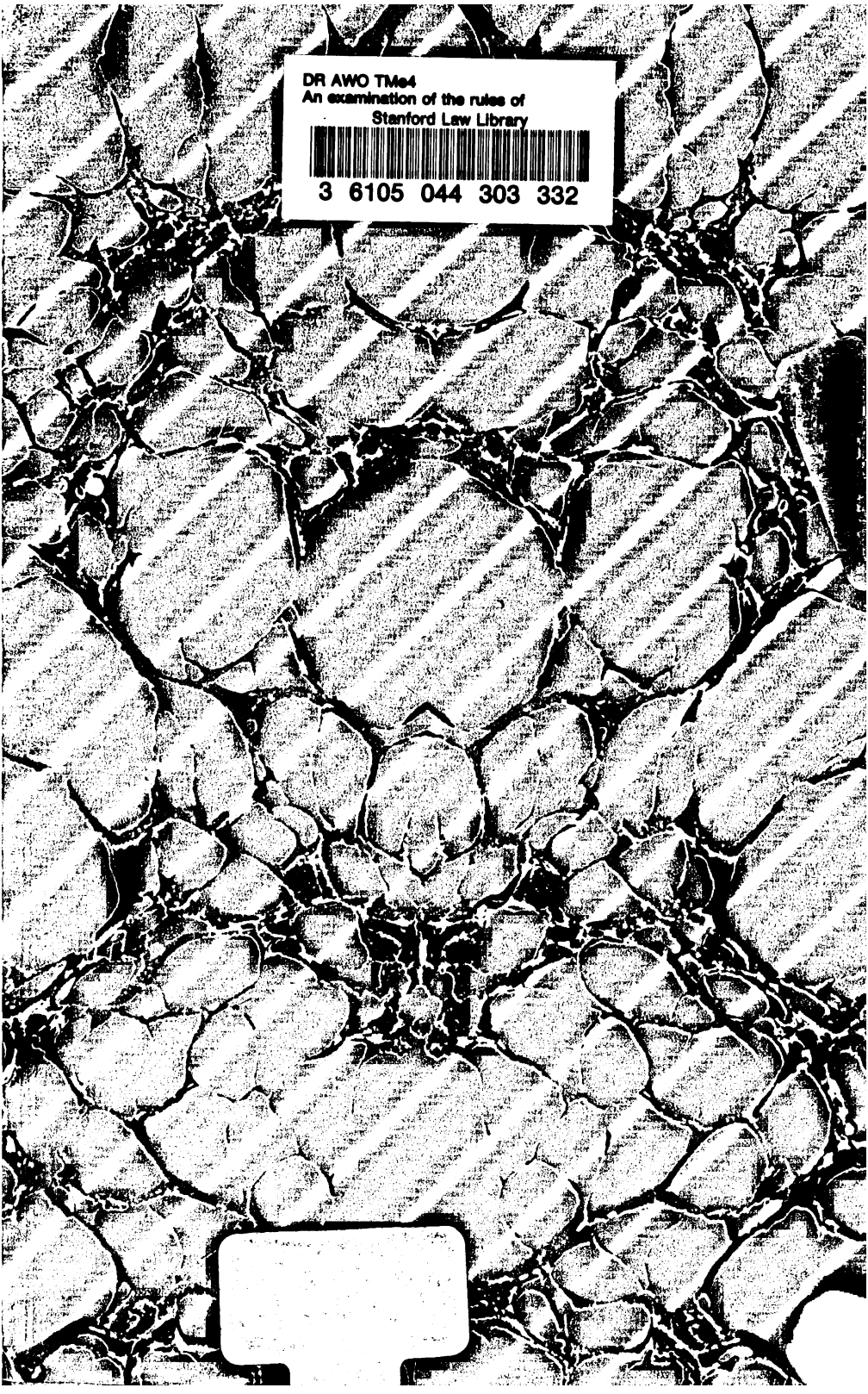
"Parol evidence of what the testatrix meant will not do, if there was any. In *Stafford* v. *Horton*, as I understand it, parol evidence, or what could only have been proved by parol declaration, was not held to be what should control the words of the will.

"After frequently changing my opinion upon the present
[202] case, as I apprehend evidence of the state of the funded property of the testatrix may be resorted to, I finally think that there is enough in the terms of the gift and the state of the property taken together, to authorize a Court to say, that the £100 was not to be £100 per annum. Those terms and that state, taken together, seem to me to authorize this construction of those legacies, as reasonably as any words in *Fonnereau* v. *Poyntz* authorized a limited construction of sums of Long Annuities in that case.

"This is the opinion I have finally formed, after giving attention repeatedly to every part of the gifts in, and contents of, the will and codicil, and all the reasoning I have met with in Reports. That this is a very doubtful case, and that, therefore, no opinion of mine upon it, or as I think of anybody, can be represented justly as unquestionably right, I admit: but such as my opinion is, I have stated. If it is acted upon, the legacy in question is £100, and not £100 per annum."

J. E. TAYLOR, PRINTER, LITTLE QUEEN STREET, LINCOLN'S INN FIELDS.




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